IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

N.M. Ct. App. No. 33,697

OSCAR ARVIZO,

Defendant-Appellant.

BRIEF IN CHIEF

Oral Argument Requested pursuant to NMRA 12-214
Oral argument would assist the court in exploring the legal issues raised.

Direct appeal taken from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Briana Zamora, Presiding

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Statement of Compliance

As required by Rule 12-213(F)(3) NMRA, I certify that this brief is proportionally spaced using Times New Roman and the body of the brief contains 9,680 words (not to exceed 11,000 for a brief in chief). This brief was prepared using Microsoft Word, version 2002.

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INTRODUCTION

Oscar Arvizo was convicted of criminal sexual contact (CSC) with a minor and related charges following a jury trial. The case was a "he said, she said" with no physical evidence, no third-party eyewitnesses, and delayed reporting.

Mr. Arvizo was found guilty of CSC of a minor in the second degree (13-18 years old, position of authority), CSC of a minor in the third degree (13-18 years old, position of authority), attempt to commit a felony (CSC of a minor), and bribing or threatening a witness. The judge dismissed the count of attempt to commit a felony on double jeopardy grounds.

SUMMARY OF FACTS AND TESTIMONY RELEVANT TO APPEAL

Motion hearing 09-19-11

The court held a motion hearing regarding the defense's motion to allow the introduction of evidence pursuant to Rule 11-413 NMRA (renumbered as Rule 11-412 NMRA in 2012). **[RP 145]** That rule requires a pre-trial, in camera, hearing to determine the admissibility of evidence "offered to prove that a victim engaged in other sexual behavior." The defense filed a brief in support of its motion. **[RP 155]**

The defense moved to be allowed to introduce evidence that the defendant, Oscar Arvizo, witnessed the alleged victim, A.B., engage in oral sex with another minor, D.B., and that this gave her a motive to lie and make allegations against Mr.

Arvizo. In effect, the argument was that she preemptively made allegation against Mr. Arvizo in order to prevent him from informing her parents about her conduct. Mr. Arvizo had advised the police of this when he was first interviewed by them. **[09-19-11 10 Tr. 6:11-8:15]**

The defense argued that the controlling case was *State v. Stephen F.*, 2008-NMSC-037, 144 N.M. 360. The defense argued that Mr. Arvizo's case was similar to *Stephen F.* in that his case was basically a swearing match between two individuals. The defense pointed out "there's no physical evidence, there's no DNA evidence, there's no independent witnesses, there's no confession by my client. This is a case of he said/she said. It's a swearing match." **[09-19-11 10 Tr. 10:20-10:23]** The defense cited *State v. Santillanes* for the proposition that motive to fabricate and bias are never collateral. 1974-NMCA-092, ¶ 5, 86 N.M. 627. The defense also cited *U.S. v. Abel*, 469 U.S. 45, 52 (1984), for the proposition that bias is almost always relevant. **[09-19-11 10 Tr. 11:14-11:24]** The defense also cited *State v. Johnson*, 1997-NMSC-036, ¶ ¶ 27-28, 123 N.M. 640, which lays out a multi-prong test that is to be used by trial courts to guide their decisions on admissibility. **[09-19-11 10 Tr. 10:11-10:18]**

The state argued that the defense could not meet the *Johnson* prongs and went through them one by one. The state argued that the defense could not make a "clear showing" that the sex act had actually taken place, which is the first prong.

[09-19-11 10 Tr. 16:14-17:6] The state then argued, pursuant to the second prong, that the sex acts the defense was trying to introduce and the alleged criminal acts were completely different and that "In terms of motive to fabricate, they're not relevant." **[09-19-11 10 Tr. 17:7-17:15]** The state argued that the third prong was not met. It distinguished *Stephen F.*, stating that in that case the victim had been previously punished for sexual conduct whereas in the current case there was no such history. The state argued that the defense never asked either the victim nor her mother (at pretrial interviews) about what kind of punishments were imposed and that A.B. "has shown no fear and has no history of being severely punished." **[09-19-11 10 Tr. 17:16-19:1]**

The prosecution argued that under the fourth *Johnson* prong the evidence was not necessary to Mr. Avizo's defense and that he could cross-examine and impeach. **[09-19-11 10 Tr. 19:2-19:8]** The prosecution also argued that the defense failed to make a sufficient showing that the probative value of the evidence would outweigh its prejudicial effect, the fifth *Johnson* prong. **[09-19-11 10 Tr. 20:10-21:3]** The prosecution then summarized its argument regarding the Johnson factors and argued that the prejudicial effect of the evidence outweighed any probative value. **[09-19-11 10 Tr. 21:22-23:15]**

The court then heard from Ms. Amada, an attorney representing both A.B. and her mother. Ms. Amada argued that the state had a strong public policy of

preventing "unwarranted intrusions" into the private affairs of sex crime victims. She mirrored many of the prosecution's arguments regarding the *Johnson* prongs. **[09-19-11 10 Tr. 24:8-30:1]**

The defense then called Richard Abeyta to the witness stand. He was employed as an investigator for the Public Defender's Office for at least sixteen years. He testified that he had spoken with D.B. Mr. Abeyta had been accompanied by Tanya Dickinson, another investigator for the Public Defender's Office. **[09-19-11 10 Tr. 30:17-33:1]** Mr. Abeyta testified that D.B. had said he received oral sex from A.B. Mr. Abeyta had not recorded the admission as A.B. hadn't given him permission to record. Mr. Abeyta requested that D.B. write out a statement, and D.B. did so. Mr. Abeyta and Ms. Dickinson signed it. **[09-19-11 10 Tr. 33:23-35:22]** Mr. Abeyta agreed that in the written statement D.B. had written that he was "kissing" A.B. and made no mention of oral sex. He also agreed that D.B.'s statement about receiving oral sex from A.B. was "clear"." **[09-19-11 10 Tr. 35:23-37:8]**

On cross-examination from the prosecution Mr. Abeyta agreed that D.B's written statement did not mention "oral sex," only "kissing." **[09-19-11 10 Tr. 49:10-49:15]** He also testified that when he later spoke with D.B., D.B. denied having told him that he had oral sex with A.B. **[09-19-11 10 Tr. 50:14-50:25]** Mr. Abeyta again testified that D.B. had said he had oral sex. He also testified that D.B.

had told him that he didn't know Mr. Arvizo was awake when it happened, and that Joe Montano, a relative, had indicated that Mr. Arvizo had seen it. **[09-19-11 10 Tr. 53:14-54:2]**

The defense then called Tanya Dickinson to the stand. She testified that she was an investigator with the Public Defender's office and had been for about three-and-a-half years. She testified that she had accompanied Rick Abeyta to the interview of D.B. **[09-19-11 10 Tr. 56:14-57:14]** She testified that she had asked D.B. if he had received a "blow job" from A.B. and that he had said "yes." Mr. Abeyta then asked D.B. if that meant he had received oral sex from A.B. and he responded "yes." **[09-19-11 10 Tr. 57:15-57:24]**

The prosecution called David Nuckols to the stand. He testified that he was an investigator for the District Attorney's office of the Second Judicial District and had been so employed for over thirty-two years. He had met with D.B. and identified notes that he had written about that meeting. **[09-19-11 10 Tr. 72:10-73:5]** He testified that D.B. told him that the Public Defender investigators had asked him "six or seven" times if he had oral sex and that he had told them no, it was just kissing. When Mr. Nuckols asked D.B. if told the Public Defender investigators if he had oral sex, he told Mr. Nuckols "I didn't tell them that." **[09-19-11 10 Tr. 79:1-79:25, 81:22-82:1]**

The court entered a written order on December 28, 2011, denying the defense's motion to permit the introduction of the Rule 413 evidence. **[RP 294-295]** The court cited *Stephen F.*, 144 N.M. 360, and *Davis v. Alaska*, 415 U.S. 308, and differentiated them by finding that in Mr. Arvizo's case there was "a genuine issue of fact as to whether the Defendant's theory of bias is a viable theory." In considering the proffered evidence the court applied the balancing test of Rule 11-403 NMRA. The court found that the "alleged prior conduct of the victim is not relevant and material,"; that there was no "clear showing" that the acts took place; and that the alleged acts did not resemble the charges in the instant case. The court applied the Rule 11-403 test and found that the probative value was substantially outweighed by the danger of unfair prejudice, and that the defendant's confrontation rights were not violated by exclusion of this evidence. **[RP 294-295]**

The defense filed a motion to reconsider, which the judge denied. At a hearing on January 19, 2012, the defense moved to supplement the record and the judge permitted it to do so. The defense cited *Bailey v. Central Vermont*, 319 U.S. 350 (1943), in which the United States Supreme Court emphasized the role of the jury in deciding controverted evidence. The defense cited several other Supreme Court cases. **[01-19-12 13 Tr. 3:19-7:4]**

The defense also asked the court to consider allowing Mr. Arvizo to testify that he saw A.B. and D.B. kissing (which was uncontroverted) even if it did not

permit him to testify about witnessing oral sex. The defense argued that Rule 11-413 only applied to prior sexual contact or conduct and "Kissing is not part of that." The defense argued that the kissing was still a motive for A.B. to fabricate. The defense cited several cases, including *Holmes v. South Carolina*, 547 U.S. 319 (2006), for the proposition that Mr. Arvizo had a right to "present a complete and full defense," and that Rule 11-413 must yield to Mr. Arvizo's confrontation rights. **[01-19-12 13 Tr. 7:5-13:1]**

The prosecution argued that whether or not kissing is considered "sexual activity" the kissing in question was irrelevant to the case. It asked the judge to uphold her ruling on the Rule 11-413 evidence (oral sex) and to exclude evidence of kissing as it was irrelevant. **[01-19-12 13 Tr. 17:16-18:13]**

The judge reserved ruling. **[01-19-12 13 Tr. 22:20-23:1]**

Motion hearing 07-01-13

The parties argued the defense motion to dismiss because of lost evidence. The defense argued that a videotaped interview of Mr. Arvizo had been lost or destroyed. The copy in evidence was unreadable and the detective could not locate any other copies. The defense argued that this was a "he said-she said" case where Mr. Arvizo's demeanor during the interview was "crucial." **[07-01-13 16 Tr. 4:18-5:17]** The prosecution argued that permitting cross-examination of the detective would be an appropriate remedy. **[07-01-13 16 Tr. 5:23-6:9]** The court ruled that

the defense could cross-examine the detective and that the jurors would be given an instruction regarding the lost evidence. The judge asked both parties to prepare an instruction and stated that he would "tweak" and give it. **[07-01-13 16 Tr. 10:6-10:19]**

Motion hearing 07-12-13

The parties argued a speedy-trial motion filed by the defense. The defense supplemented its written motion by arguing facts that showed prejudice. The defense argued that three witnesses could not recall cell phone numbers when interviewed by the defense, and that those numbers were important to establish whether A.B. disclosed via text. **[07-01-13 16 Tr. 12:18-13:21]** The defense also argued that A.B.'s mother could not recall where or how she took photos of cuts on A.B.'s arms, allegedly made by A.B. herself. **[07-01-13 16 Tr. 13:22-15:13]** The defense also cited Detective Sheldon not recalling whether Mr. Arvizo offered to take a polygraph test. **[07-01-13 16 Tr. 16:12-17:8]** The defense argued that it was an intermediate complexity case for speedy trial purposes. **[07-01-13 16 Tr. 17:9-17:21]**

The prosecution argued that much of the delay was due to the defense not requesting information in a timely manner, there was no prejudice shown, and that most of the continuances were stipulated. **[07-01-13 16 Tr. 19:1-21:16]**

The court ruled that it adopted the procedural background and timelines from the prosecution. The court found that it was a complex case and the delay was approximately 36 months. A substantial portion of the delay was attributable to the defense and found no prejudice to Mr. Arvizo. The court denied the defense motion. **[07-01-13 16 Tr. 21:17-24:17]**

The court then addressed whether or not Dr. Ornelas could testify that "A normal medical exam does not make it more or less likely that any sexual assault occurred." **[07-01-13 16 Tr. 24:18-27:25]** The parties and the court extensively cited *State v. Lente*, 2005-NMCA-111, 138 N.M. 312. **[07-01-13 16 Tr. 41:1-44:12]** The judge ruled to allow the testimony, stating "If I commit reversible error, the law will change and maybe there's clarification. These matters related to Dr. Ornelas are not easy matters, some are gray areas, but we'll do the best we can." **[07-01-13 16 Tr. 46:14-46:19]**

Trial first day 07-16-13

The State's first witness was the alleged victim, A.B. She testified about Mr. Arvizo spending time at her parent's house, where she resided.

She testified, when asked if Mr. Arvizo could tell her not to go outside, that "I don't—I'm sure he could, but it wasn't something like—I really just—usually, just listened to my parents, and if they said "No," then I couldn't' but otherwise..." When asked if she had to "pay respect" to him she replied "Yes, I – I would. I

would have to – I couldn't talk back, or anything. My parents would yell at me if I were to say anything rude. That's just respect." She testified that Mr. Arvizo and his family stayed over at her house "probably like once a month." **[07-16-13 19 Tr. 44:10-45:12]**

A.B. testified that in December of 2009, while Mr. Arvizo was staying at the house he grabbed her buttocks while she was in a hallway and she pushed him away. **[07-16-13 19 Tr. 50:14-51:19]** She testified that later that night she was awoken and that Mr. Arvizo was "right next" to her with his hands on her "private areas." **[07-16-13 19 Tr. 55:18-55:24]** She testified that when she woke up her pajama pants were pulled down to about mid-thigh, and Mr. Arvizo was making skin-to-skin contact with her "outer lip." She told him "What are you doing? Get off me." **[07-16-13 19 Tr. 56:2-57:15]** She testified that she was thirteen years old at the time. She testified that Mr. Arvizo told her "I'm looking for your pussy, so I can stick my finger in it." She testified that she pushed him off and he left the room, and that she ripped up her pants because she was mad. She testified that she cried herself to sleep. **[07-16-13 19 Tr. 58:3-60:1]**

She testified that the next morning Mr. Arvizo came into her room and asked her "Are you going to tell anybody?" **[07-16-13 19 Tr. 61:10-62:9]** She testified that her father overheard and asked Mr. Arvizo "Tell anybody about what?" and that Mr. Arvizo claimed he had tripped A.B. the night before. She testified that she

agreed with this account, though he had never tripped her. **[07-16-13 19 Tr. 62:11-63:5]** She testified that when Mr. Arvizo asked her if she would tell anybody it made her feel scared and "freaked me out, like – so I didn't want to tell anybody." **[07-16-13 19 Tr. 63:15-63:21]**

A.B. then testified that she didn't tell anyone because she was afraid no one would believe her and that as a result of the incident she started cutting herself. She had never cut herself before the incident. **[07-16-13 19 Tr. 64:16-65:17]** She also testified about the circumstances that led to her informing her father what Mr. Arvizo had allegedly done. **[07-16-13 19 Tr. 77:22-80:10]**

A.B. testified that she had lied when she told defense counsel, during a pretrial interview, that she had never kissed D.B. She also testified that she was scared to tell her father that. She testified "My dad is very, very strict, and – I mean, I know he wouldn't have wanted me to have a boyfriend." She denied making up the allegations against Mr. Arvizo to cover up her kissing D.B. **[07-16-13 19 Tr. 81:19-82:24]** She then testified about speaking with the police and her S.A.F.E. House interview. **[07-16-13 19 Tr. 84:25-87:11]**

Bench argument about impeachment/refreshment

Before the defense began its cross-examination there was a bench conference. The judge asked the defense how it planned the "mechanics" of impeaching A.B. with prior inconsistent statements. The defense indicated that it

would ask her about her previous testimony, and if it differed from what she said previously he would ask her about it. If she said "I don't remember" then he would introduce the previous inconsistent statement. **[07-16-13 19 Tr. 96:2-97:14]** The court stated that if A.B. said "I don't remember" then the defense would have to show her the document and establish that she didn't remember. The defense cited *State v. Gonzales*, 1992-NMSC-003, ¶¶ 24-25, 113 N.M. 221, *overruled on other grounds by State v. Montoya*, 2013-NMSC-020, 306 P.3d 426. The defense argued that it did not have to do the "middle step" of exhausting her memory. The defense argued that it wasn't doing "past recollection recorded" and that it was not required to refresh her memory. The judge ultimately ruled that the defense would have to show A.B. the prior inconsistent statement out of the presence of the jury. **[07-16-13 19 Tr. 97:15-108:13]**

The prosecution argued that A.B. had to be given an opportunity to accept or deny a statement, otherwise it was not impeachment. The defense argued that by claiming a lack of memory she was not confirming or denying, but was given the opportunity. The defense argued that making it follow that procedure would be "an extreme waste of time" and that it was "extremely prejudicial" to Mr. Arvizo. The defense continued to argue that it did not have to first try and refresh memory. **[07-16-13 19 Tr. 111:7-112:6]**

Cross-examination of A.B.

A.B. agreed that Mr. Arvizo never threatened her. She also agreed that he never promised her anything or intimidated or threatened her in "any way." **[07-16-13 19 Tr. 117:22-118:9]** She also agreed that she never called Mr. Arvizo "uncle." **[07-16-13 19 Tr. 118:10-118:12]** She also agreed that Mr. Arvizo was "never like a father figure" to her, was never "in a position to take care of you in any way," that he never bought her anything like school supplies or clothes, and that he did not have permission from her parents to discipline her. **[07-16-13 19 Tr. 120:13-122:6]** A.B. also agreed that Mr. Arvizo did not have permission from her parents "to control you in any way," or to send her to her room, or to make her do chores, or tell her what kind of clothes to wear. **[07-16-13 19 Tr. 122:25-123:14]** During the cross-examination the jury had to step out several times while the defense refreshed A.B.'s memory **[07-16-13 19 Tr. 119:21, 163:1, 176:24]**

On re-direct examination A.B. was asked "When he [Mr. Arvizo] was in your house, did you listen to what he asked?" and she replied "No." **[07-16-13 19 Tr. 195:24-196:1]**

Testimony of Dr. Ornelas

On direct examination Dr. Ornelas testified that she gave a medical examination to A.B. and that the results were "normal." She testified that this was consistent with the history that A.B. gave her. **[07-16-13 20 Tr. 158:22-159:23]**

On cross-examination she testified that a normal medical exam would also be consistent with no sexual assault happening. **[07-16-13 20 Tr. 166:17-170:14]**

Testimony of Valerie Barreras, A.B.'s mother

On direct examination the State asked Ms. Barreras "did he [Oscar Arvizo] have the ability to ask [A.B.] to be quiet?" She replied "He could have asked her. We didn't say, you know, that he had authority over her, but I don't know if he did or didn't." She was also asked "If he asked her to not go outside or sit down, would she have to listen to him, if he [Oscar Arvizo] was at your house?" and she replied "If we were there and it was a good reason, yes." **[07-18-13 21 Tr. 27:7-27:17]** On cross-examination Ms. Barreras agreed that in a pretrial interview, when asked if Mr. Avizo had never been in a position of authority or control over her kids, she had said "Yes." **[07-18-13 21 Tr. 35:9-35:21]**

Testimony of Anthony Barreras, A.B.'s father

During cross-examination, Anthony Barreras agreed that he didn't let his daughters go anywhere, even to their grandmother's, unless he approved it. He also agreed that he was a very protective father. **[07-18-13 21 Tr. 122:13-122:21]** Mr. Barreras also agreed that during a pretrial interview, when asked "And he [Oscar Arvizo] was never in a position to control their lives, in any way, as a father figure or as an authority figure" Mr. Barreras had replied "No. He wasn't around that

often." Mr. Barreras also agreed that "[Mr. Arvizo] never provided any financial, emotional, or moral support for your children." He also agreed that he had never heard his children call Mr. Arvizo "Uncle." **[07-18-13 21 Tr. 144:17-146:3]**

Closing arguments

During the state's closing argument the prosecutor stated "He [Oscar Arvizo] was her [A.B.'s] uncle. It does not matter if he called him "Uncle." "As long as he was a relative, that is a person in position of authority." **[07-22-13 23Tr. 13:21-13:23]**

Concerning the testimony of Dr. Ornelas, the prosecutor stated "As an expert witness, she was able to do an exam and she said that the history given and the exam were consistent with sexual abuse." **[07-22-13 23Tr. 19:20-19:22]**

During the state's rebuttal closing the prosecutor stated "But he [Oscar Arvizo] was a relative, and by that relationship, he's able to tell her what to do, to exercise control of her, and he used that to do that to her that night." **[07-22-13 213Tr. 61:25-62:3]**

ARGUMENT

I. The trial court erred by denying admission of A.B.'s motive to lie.

A district court's decision to exclude evidence under the rape shield law is reviewed for abuse of discretion. *State v. Stephen F.*, 2008-NMSC-037, ¶ 8.

However, the question of whether the Confrontation Clause has been violated is reviewed de novo. *State v. Montoya*, 2014-NMSC-032, ¶¶ 15-16 (clarifying the standard of review in the context of sexual conduct evidence and the Confrontation Clause). *See also* **[RP 294-295]** (Trial court's order finding that Mr. Arvizo's Confrontation Clause rights were not violated).

In this case defendant Oscar Arvizo wanted to produce evidence that he had observed the alleged victim (A.B.) engage in oral sex with D.B. Mr. Arvizo, when asked by police during his questioning if A.B. had a motive to lie, had told them of the incident. The defense wanted the evidence introduced to show that A.B. had a motive to lie and did so in order to preempt Mr. Arvizo from reporting her conduct to her strict parents.

In accordance with Rule 11-413 NMRA (now numbered Rule 11-412 NMRA) the defense requested an in camera hearing on the admissibility of the evidence. The defense presented testimony of two Public Defender investigators that D.B. had confirmed he had oral sex with A.B. as Mr. Arvizo claimed. The prosecution put on one witness, a District Attorney investigator, who testified that D.B. had denied to him ever making such an admission to the Public Defender investigators. Neither A.B. nor D.B. testified at Rule 413 hearing, though the prosecution argued that A.B. had also denied having oral sex with D.B., but had admitted to kissing him.

The trial court judge ordered the evidence of oral sex excluded from the trial. The court cited Rule 11-413 NMRA (the Rape Shield Rule) and *State v. Stephen F.*, 2008-NMSC-037, ¶ 8, 144 N.M. 360. *Stephen F.* cited a five-factor test from an earlier New Mexico case, *State v. Johnson*, 1997-NMSC-036, ¶ 24, 123 N.M. 640. *Johnson* set out factors to guide the court in the application of the rape shield rule. The first of the *Johnson* factors was whether or not there was a "clear showing" that the conduct to be introduced actually occurred. The court found that "no clear showing has been made complainant [A.B.] committed the prior acts." **[RP 316]** The court later stated "Moreover, without a clear showing that the alleged previous sexual contact occurred, it is difficult to see how the purported evidence is relevant to a material issue such as...bias, or that the information is critical to Defendant's defense as outlined in the third and fourth factors." **[RP 317]**

a. The standard of proof for preliminary questions in New Mexico

The question of whether Mr. Arvizo witnessed A.B. and D.B. having oral sex is a preliminary question of fact. Neither the Rape Shield Statute (NMSA § 30-9-16(A)) nor its corollary rule (currently Rule 11-412) sets out the standard of proof required for a preliminary question such as "Did the act being proposed for admission ever happen?"

Preliminary questions are governed by New Mexico Rule 11-104 NMRA. Rule 11-104(B) states that "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."

"Under this standard, the trial court does not determine whether the conditional fact has been proven by a preponderance of the evidence. Instead, "[t]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact... by a preponderance of the evidence." *State v. Martinez*, 2007-NMSC-025, ¶ 20, 141 N.M. 713, *citing Huddleston v. United States*, 485 U.S. 681 (1988).

Rule 11-104(A) NMRA states that "The court must decide any preliminary question about whether... evidence is admissible." Even if the court does the deciding, however, there is no guidance in the rule as to what standard of proof it must use. New Mexico case law holds that preponderance of the evidence is the standard to be used by judges when deciding preliminary questions. *Tartaglia v. Hodges*, 200-NMCA-080, ¶ 30, 129 N.M. 497 (citation omitted).

This standard is also supported by learned treatise:

> One sticky evidentiary question is what standard the court applies when evaluating whether sufficient evidence has been presented to justify the admission of evidence regarding the complainant's prior sexual history. Generally, the judge decides whether a reasonable juror, using a preponderance of evidence standard, could conclude that the relevant fact

existed, for example, in the context of a rape-shield law, whether a sexual relationship existed between the complainant and a third person.

1 Wharton's Criminal Evidence § 4:9 "Conditional Relevancy" (15th ed.)

b. The trial court judge used a "clear and convincing" standard.

The trial court judge used the terminology "clear showing" in describing the standard of proof that he used, though in New Mexico the more common terminology is "clear and convincing evidence." *See Guardianship of Jenna G.*, 63 Cal.App.4th 387, 391 (holding that "clear showing" had been "consistently interpreted" as meaning "clear and convincing evidence," at least as far as the California Family Code was concerned.). *See also Middle Tennessee Elec. Membership Corp. v. Neely*, not reported in S.W.2d (Tenn. App. 1988) 1988 WL 85342, *5 ("We understand the term 'clear showing' to be a variation of the term 'clear and convincing evidence'".)

c. "Clear and Convincing" is the wrong standard

In *Johnson*, 1997-NMSC-036, the New Mexico Supreme Court quoted the "clear showing" standard from a Wisconsin case, *State v. Herndon*, 145 Wis.2d 91, 426 N.W.2d 347 (App. 1988), *overruled on other grounds sub nom. State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325. *Herndon* enunciated the "clear showing" standard, citing as authority (at footnote 103) a law review article –

Abraham Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 Cornell L.Rev. 90 (1977-78).

That law review article states that "Properly applied, the doctrine requires clear and convincing proof that the previous acts occurred." Ordover, *supra*, at 111. That statement is footnoted at note 116, where federal case law regarding preliminary questions is cited. That federal case law was overturned shortly after the article was published.

For example, the very first case cited by the law review article is *United States v. Beechum*, 555, F.2d 487, 492-98 (5th Cir. 1977). However, in that case a rehearing was granted and the opinion was superseded by *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), presumably after the law review article was finished.

The initial *Beechum* decision set forth a "clear and convincing" standard for preliminary questions, extensively citing an earlier "Broadway rule." *Beechum* 555 F.2d 487, at 492. This spurred a spirited and lengthy dissent from Judge Gee, who argued that the "Broadway rule" was no longer (in 1978) good law. *Beechum*, 555 F.2d 487, at 509 (J. Gee, dissenting). J. Gee's dissent proved prescient. The en banc Fifth Circuit agreed with him in its superseding decision, stating "[W]e must reject the Broadway standards." *Beechum*, 582 F.2d 898, 910 (C.A. Tex., 1978)

The Fifth Circuit found that "Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue...is valid only if an offense was in fact committed and the defendant in fact committed it...The issue we must decide is by what standard the trial court is to determine whether the government has come forward with sufficient proof." *Beechum,* 582 F.2d 898, 912. That decision held that "[The standard] is provided by rule 104(b): whether the evidence would support such a finding by the jury." *Id.*, 916.

In *Huddleston v. U.S.*, 485 U.S. 681 (1988) the United States Supreme Court cited *Beechum:*

> Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). *Beechum,* supra, at 912-913; see also E. Imwinkelried, Uncharged Misconduct Evidence 2.06 (1984). Rule 104(b) provides: [485 U.S. 681, 690]
>
> "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."
>
> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), **the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence.** The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact - here, that the televisions were stolen - by a preponderance of the evidence. See 21 C. Wright & K. Graham, Federal Practice and Procedure 5054, p. 269 (1977).
>
> *Huddleston v. U.S.*, 485 U.S. 681, 689-90(1988) (emphasis added)

d. No different burden was intended for rape shield rules

When Profess Ordover wrote the law review article which was the origin of the "clear and convincing" standard, he did not suggest that preliminary questions of fact in the rape shield context required a different or higher standard of proof than any other preliminary question. He was merely incorporating the then-existing understanding of the federal rules of evidence into his analysis. The first factor that he listed, that there be a "clear showing", was not creating a special standard for rape shield rules but simply laying out the then-current standard under FRE 104. That standard was changed shortly thereafter, but the case law originating in that law review article has not been updated. Thus, in Mr. Arvizo's case the trial judge mistakenly used a standard of proof that was copied from federal law that had been overturned over thirty years earlier.

e. The federal analysis is persuasive

New Mexico is not bound to interpret its rules the same as the federal courts interpret theirs. However, federal construction of the federal rules is persuasive authority for the construction of New Mexico rules when the rules use similar language. *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 9, 142 N.M. 527. The New Mexico Rule 11-104 is identical to the Federal Rule of Evidence Rule 104. "The New Mexico Rules of Evidence generally follow the

federal rules of evidence..." *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 8, 139 N.M. 671.

f. The trial court judge incorrectly analyzed the 'similarity' prong

In the state's response to the defense's Rule 413 motion, the state argued that "Even if Defendant's accusation were true, it is wholly unrelated to the charges and the types of offenses alleged against him." **[RP 213]** The trial court adopted that view, finding that "Secondly, the alleged sexual acts of the victim do not closely resemble the charges in the instant case." **[RP 294]** However, Mr. Arvizo's case is similar to that of *Stephen F.*, where the New Mexico Supreme Court found "A comparison of [alleged victim's] prior sexual encounter with the details of the alleged rape is simply not relevant to Stephen's theory that [alleged victim] fabricated the allegation because she feared being punished by her parents." 2008-NMSC-037, ¶ 12. Mr. Arvizo's theory is likewise that A.B. fabricated because of fear of being punished by her parents, and likewise the similarity of the acts he witnessed and the alleged CSC are not relevant.

The court abused its discretion in denying Mr. Arvizo's motion to allow the introduction of evidence relevant to the alleged victim's motive to lie. Mr. Arvizo was also denied his right to confrontation. *State v. Montoya*, 2014-NMSC-032, ¶ 44.

II. The trial court prevented impeachment of A.B. by requiring the defense to first refresh memory.

By requiring the defense to repeatedly refresh A.B.'s memory the trial court was interfering with the cross-examination, which was in effect a limitation on cross-examination. Abuse of discretion is the standard of review for limitations on cross-examination. *State v. Brown*, 1998-NMSC-037, ¶ 25, 126 N.M. 338. Mr. Arvizo was prejudiced by the limitation as it required the defense attorney to have the jury excused multiple times, possible prejudicing them against him while interrupting the flow of the cross-examination and giving A.B. additional time to tailor answers.

A.B. testified that she did not remember making the prior inconsistent statements that the defense was attempting to impeach her with. "[T]he answer of a witness that he does not remember having made a prior inconsistent statement is as adequate a foundation as a flat denial." *Williamson v. U.S.*, 310 F.2d 192, 199 (C.A.Cal. 1962). Requiring repeated pauses and making the defense attempt to refresh memory added confusion and wasted time to the trial in addition to the prejudice to Mr. Arvizo.

III. Mr. Arvizo was not a "person in a position of authority" and there was no evidence that he coerced A.B.

To the extent this issue implicates the proper construction of New Mexico statutes the standard of review is de novo. *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372 ("we review questions of statutory interpretation de novo.").

In reviewing the sufficiency of the evidence, the court must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711 (citations omitted).

Mr. Arvizo was convicted of criminal sexual contact (CSC) of a minor in the second degree by a person in a position of authority (count 1) as well as CSC of a minor in the third degree by a person in a position of authority (count 3). **[RP 589, 591]** The jury instructions for count 1and count 3 required the jury to find "The defendant was a relative who by reason of the defendant's relationship to [A.B.] was able to exercise undue influence over [A.B.] AND used this authority to coerce [A.B.] to submit to sexual contact." **[RP 510, 519]** This language tracks the CSC of a minor statute, NMSA 30-9-13(B)(2)(a) that "the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit."

No evidence was presented that Mr. Arvizo "coerced" A.B. According to the testimony pertaining to count 1, A.B. was asleep when Mr. Arvizo allegedly fondled her, and when she awoke she pushed him away and he left the room. According to the testimony in count 2, Mr. Arvizo grabbed A.B.'s buttocks as she walked down a hallway. In neither instance was there an element of coercion.

"Absent express definition of a term in an instruction, words in jury instructions should usually be understood according to their ordinary meaning." *State v. Magby*, 1998-NMSC-042, ¶13, 126 N.M. 361, *overruled on other grounds by State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230. The Wikipedia entry on "coercion" can be used as a guide to the ordinary meaning of the word. *State v. Benally*, 2015-NMCA-_____, FN 2, (No. 31,972, Jan. 29, 2015). Wikipedia states that coercion "is the practice of forcing another party to act in an involuntary manner..." http://en.wikipedia.org/wiki/Coercion last viewed Feb. 10, 2015. The entry states that coercion is a duress crime, and "Such actions are used as leverage, to force the victim to act in a way contrary to their own interests." *Id.* In this case there was no allegation that A.B. was forced to act in an involuntary manner. She was merely a passive recipient of unasked for contact. There was no allegation of "leverage" used or threats made, and there was no evidence that Mr. Arvizo forced A.B. to involuntarily sleep or walk in her own house.

There was also insufficient evidence that Mr. Arvizo was in a "position of authority"

> "position of authority" means that position occupied by a parent, relative, household member, teacher, employer, or other person who, by reason of that position, is able to exercise undue influence over a child."
> NMSA § 30-9-10

Mr. Arvizo was a relative, but the statute requires that by reason of that position he "is able to exercise undue influence over a child." During A.B.'s testimony she testified that Mr. Arvizo was not like a father figure, had no control over her, and her parents had not given him the authority to send her to her room, or to make her do chores, or tell her what kind of clothes to wear. When asked if she listened to what he asked she replied "No." A.B.'s mother testified that "We didn't say, you know, that he had authority over her, but I don't know if he did or didn't." **[07-18-13 21 Tr. 27:7-27:17]** She confirmed that Mr. Arvizo hadn't been told he had authority over A.B., and then said she didn't know if he in fact did or did not. A.B.'s testimony answered that question. Similarly, A.B.'s father testified about Mr. Arvizo's lack of authority over A.B. Thus, there was insufficient evidence that Mr. Arvizo satisfied the second prong of the statute, the ability to exercise undue influence due to his position.

That second prong of the statutory definition, "undue influence," must be given meaning. A court must construe statutes to avoid rendering a portion of the statute superfluous. *State v. Javier M.*, 2001-NMSC-030, ¶ 32, 131 N.M. 1. The

second prong is necessary to keep the statutory definition from being absurdly wide. If being a relative alone were enough, then everyone in the human race would qualify because all homo sapiens are "relatives." *See* Black's Law Dictionary, 10th ed. (relative – "A person connected with another by blood or affinity; a person who is kin with another."). *See also* Howard Hughes Medical Institute, "Using DNA to Trace Human Migration," online at http://www.hhmi.org/biointeractive/using-dna-trace-human-migration , last viewed Feb. 13, 2015 ("All living humans originated from populations of ancestors who migrated out of Africa less than 100,000 years ago."). By adding the condition that the relative be in position of "undue influence" the legislature greatly narrowed the scope of the statutory definition.

The prosecution attempted to overcome their insufficiency by stating during closing arguments that merely being a relative qualified Mr. Arvizo as being "in a position of authority," without reference to the "undue influence" requirement. The prosecutor said "As long as he was a relative, that is a person in position of authority." **[07-22-13 23Tr. 13:21-13:23]** That was a misleading statement.

IV. There was insufficient evidence of intimidating/threatening a witness

To convict Mr. Arvizo of intimidating/threatening a witness contrary to NMSA § 30-24-3, the jury was required to find that he "knowingly

intimidated/threatened with the intent to keep A.B. from truthfully reporting to a law enforcement officer..." **[RP 522]**

A.B. testified that the day after the incident Mr. Arvizo asked her if she was going to tell anyone. There was no testimony that he did so in a threatening or intimidating manner or made any gestures or moves that could be construed that way. The mere asking of whether someone will report something is not intimidation or a threat. A.B. testified that the question "freaked me out", but her subjective opinion does not make his question a threat. *See U.S. v. Orozco Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990), *overruled on different grounds recognized by U.S. v. Keyser*, 704 F.3d 631 (9th Cir. 2012) ("Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.") A.B. also agreed that Mr. Arvizo never promised her anything or intimidated or threatened her in "any way." **[07-16-13 19 Tr. 117:22-118:9]**

V. Dr. Ornelas' vouching testimony was improperly admitted

The defense filed a pretrial motion to exclude Dr. Ornelas' testimony that in this case the normal medical exam of A.B. did not make it more or less likely that any sexual assault happened but that it was "consistent" with what A.B. told her.

[RP 449-454] In the alternative, the defense requested an evidentiary hearing to determine the reliability of Dr. Ornelas' testimony. **Id**. The standard of review for the admission or exclusion of expert testimony is abuse of discretion. *State v. Anderson*, 1994-NMSC-089, ¶ 17, 118 N.M. 284. This issue was raised, but not reached, in *State v. Lente*, 2005-NMCA-111, ¶ 9, 138 N.M. 312. ("[I]nsofar as Defendant is now arguing that the physician should not have been permitted to testify that the normal examination was consistent with Victim's report, this issue was not properly reserved for review")

On direct examination Dr. Ornelas testified that she gave a medical examination to A.B. and that the results were "normal." She testified that this was consistent with the history that A.B. gave her. **[07-16-13 20 Tr. 158:22-159:23]** On cross-examination she testified that a normal medical exam would also be consistent with no sexual assault happening. **[07-16-13 20 Tr. 166:17-170:14]**

The testimony was irrelevant. Rule 11-401 NMRA (2007) defines relevant evidence as that with makes something "more probable or less so." The New Mexico Supreme Court has recognized that "Evidence equally consistent with two hypotheses tends to prove neither." *State v. Garcia*, 2005-NMSC-017, ¶ 17, 138 N.M. 1. *See also U.S. v. Velarde*, 214 F.3d 1204, at 1210, 1211 FN 6 (10th Cir. 2000) (analyzing similar testimony by Dr. Ornelas and reversing the conviction);

see also State v. Consaul, 2014-NMSC-030, ¶ 67 (stating that to be admissible an item of evidence "add something to the debate.")

The prosecution highlighted Dr. Ornelas testimony during its closing argument, saying "As an expert witness, she was able to do an exam and she said that the history given and the exam were consistent with sexual abuse." **[07-22-13 23Tr. 19:20-19:22];** "[B]ut you had an expert, an expert in child abuse, pediatrics, tell you that she did a full examination on [A.B.] and her findings were normal with what she had told her happened." **[07-22-13 23Tr. 62:16-62:19]** In a case where there was no physical evidence nor any third party witnesses this testimony from an expert was highly prejudicial.

VI. The court's *Chouinard* remedy was inadequate

The defense filed a pretrial motion to exclude evidence based on the destruction of evidence. **[RP 301-303]** The state filed a reply. **[RP 343-351]** The judge denied the defense's request to exclude the evidence, but ruled that the defense could cross-examine the detective on the loss of the tape and request a lost evidence instruction. **[07-01-13 16 Tr. 9:25-10:19]** An appellate court reviews a trial court's remedy for lost evidence for an abuse of discretion. *State v. Hill*, 2008-NMCA-117, ¶ 13, 144 N.M. 775.

The officer who initially interviewed Oscar Arvizo had recorded the questioning, including Mr. Arvizo's denials that he had committed the offense as

well as why he thought A.B. would make false accusations. The copy of the videotape in evidence was unreadable and it turned out that the officer did not have a back-up copy. **[07-01-13 16Tr.4:9-10:21]**

The test for loss of evidence claims is set out in *State v. Chouinard*, 1981-NMSC-096, 96 N.M. 658. It sets out a three-part test to determine whether deprivation of evidence is reversible error: 1) The state either breached some duty or intentionally deprived the defendant of evidence; 2) The improperly "suppressed" evidence must have been material; and 3) The suppression of this evidence prejudiced the defendant. Id. ¶ 15.

In this case the state breached its duty to preserve the evidence (the videotape of Mr. Arvizo's questioning). "It is generally understood that the State has a duty to preserve evidence obtained during the investigation of a crime." *State v. Pacheco*, 2008-NMCA-131, ¶ 28, 145 N.M. 40 (citation omitted).

The lost evidence was material as it was an impartial recorder of Mr. Arvizo's demeanor and statements during the questioning. In a case such as this, which is basically a "swearing match" between the alleged victim and the alleged perpetrator, Mr. Arvizo's response to the questioning would have been very probative. In addition, the defense contested that the officer's account of what Mr. Arvizo said was accurate. **[07-01-13 16Tr. 9:20-9:24]**

The suppression of the evidence prejudiced Mr. Arvizo. The missing evidence was particularly important to Mr. Arvizo in light of the weakness of other evidence of his guilt, *i.e.* the testimony of A.B. alone. "The strength of other evidence of defendant's guilt" is one of the two components to the prejudice prong. *State v. Duarte*, 2007-NMCA-012, ¶ 11, 140 N.M. 930 (citation omitted). In *Duarte* the Court of Appeals found no prejudice because the case against the defendant was otherwise strong, including a .13 breath alcohol score in a DUI case. *Id.* There is no such strong corroborative evidence in Mr. Arvizo's case. The jury was improperly denied an opportunity to observe his demeanor or denials of the allegations when they were first made against him.

VII. Mr. Arvizo's right to a speedy trial was violated

The defense filed a motion to dismiss on speedy trial grounds. **[RP 446]** The state filed a response. **[RP 457]** Mr. Arvizo was charged in this case on June 28, 2010, and arrested on June 30, 2010. **[RP 446]** His jury trial did not commence until July 15, 2013. Thus, it was over thirty-six months before Mr. Arvizo was brought to trial.

Under the Sixth Amendment to the United States Constitution, a person who is accused of a crime has a fundamental right to a speedy trial. *State v. Garza*, 2009–NMSC–038, ¶ 10, 146 N.M. 499, 212 P.3d 387. At the heart of this right is "preventing prejudice to the accused." Id. ¶ 12. In effect, the right is intended "to

prevent oppressive pretrial incarceration [,]" to minimize anxiety accompanying public accusation, and "to limit the possibility that the defense will be impaired." *State v. Spearman*, 2012–NMSC–023, ¶ 34, 283 P.3d 272 (internal quotation marks and citation omitted); *accord Garza*, 2009–NMSC–038, ¶ 12, 146 N.M. 499, 212 P.3d 387.

Determining whether a defendant's speedy trial right has been violated requires a review of the particular circumstances of each case including consideration of the conduct of the prosecution, that of the defendant, and "the harm to the defendant from the delay." *Garza*, 2009–NMSC–038, ¶ 13, 146 N.M. 499, 212 P.3d 387. Our analysis in this regard is guided by considering four factors: "(1) the length of delay[;] (2) the reasons for the delay[;] (3) the defendant's assertion of [her] right[;] and (4) the actual prejudice to the defendant that, on balance, determines whether a defendant's right to speedy trial has been violated." *Id.* (internal quotation marks and citation omitted).

On appeal from an order of dismissal for a violation of a defendant's right to a speedy trial, "we give deference to the district court's factual findings," but we review the speedy trial factors de novo. *Spearman*, 2012–NMSC–023, ¶ 19, 283 P.3d 272 (alteration, internal quotation marks, and citation omitted).

The thirty-six month delay in Mr. Arvizo's case triggers a speedy trial inquiry, even if the case was considered complex. *See Garza*, 2009–NMSC–038, ¶

2, 146 N.M. 499 (stating that the length of delay necessary to trigger the speedy trial inquiry is eighteen months for complex cases). "[T]he greater the delay[,] the more heavily it will potentially weigh against the [prosecution]." *Garza*, 2009–NMSC–038, ¶ 24, 146 N.M. 499, 212 P.3d 387. In this case the eighteen month delay *beyond* the eighteen month triggering delay should weigh heavily against the state.

The reasons for the delay should also count against the state. On January 20, 2012, a firm trial date of January 25, 2012, was reset because of an assistant district attorney leaving the office. The resultant string of delays was due to the state's failure to have a second chair in place in anticipation of the first prosecutor leaving.

Mr. Arvizo was prejudiced by the inordinately long pretrial delay. In addition to video evidence being lost, the memories of witnesses A.B., Valerie Barreras, and Anthony Barreras had faded, interfering with cross-examination. During the cross-examination the jury had to step out several times while the defense refreshed A.B.'s memory. **[07-16-13 19 Tr. 119:21, 163:1, 176:24]**

The length of delay weighs in favor of Mr. Arvizo. The assertion of the right is weighed slightly in his favor. The reasons for the delay are also slightly in his favor. Finally, the prejudice Mr. Arvizo suffered weighs in his favor. None of the factors weighs in the state's favor, and the balancing test is in favor of Mr. Arvizo.

See State v. Lujan, No. 33,349 (NMCA Feb. 18, 2015), ¶ 27 (laying out the balancing test for speedy trial).

VIII. The prosecution improperly referred to A.B. as a "victim."

During closing arguments the assistant district attorney repeatedly stated that the defense was "blaming the victim." **[07-22-13 23Tr. 57:17-57:19, 68:10-68:10]** During pretrial motions in limine the trial court had ordered that A.B. not be referred to as "victim." The defense filed a motion to reverse based on this prosecutorial misconduct, and the trial court denied the motion. **[RP 685]**

The defense did not make an objection at the time the improper argument was made. But "Notwithstanding the lack of a timely objection at trial, an appellate court will apply the doctrine of fundamental error and grant review of certain categories of prosecutorial misconduct that compromise a defendant's right to a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 27, 128 N.M. 482; Rule 12-216 NMRA. "To find fundamental error, we must be convinced that the prosecutor's conduct created 'a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them.'" *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351. In this case, given the paucity of evidence against Mr. Arvizo, the prosecutions proclamation that A.B. was a 'victim' could have tipped the jury, and Mr. Arvizo's guilt is so doubtful as to shock the conscience. *See State v. Bunce*, 1993-NMSC-057, ¶ 15, 116 N.M. 284

(reversing conviction under doctrine of fundamental error when the jury instructions as given would allow the jury to convict the defendant even if innocent).

IX. The trial court judge's recusal of himself two days after the trial

The judge who presided over the trial recused himself two days after the trial and a different judge sentenced Mr. Arvizo. The defense argued that "it is a reasonable inference that something occurred during the trial requiring the court to recuse itself." **[RP 736]** It is within the discretion of the district judge to recuse or not recuse from a case, and that decision will be reversed only upon a showing of an abuse of that discretion. *Demers v. Gerety*, 1978-NMCA-019, ¶ 10,92 N.M. 749 (Ct.App.1978), *rev'd on other grounds by* 92 N.M. 396, 406 (1978).

However, even if the recusal was unrelated to the case, the judge who sentenced Mr. Arvizo did not have the benefit of sitting through the trial. "Generally, an unusual or exigent circumstance must exist for a different judge to impose a sentence." *Sims v. Ryan*, 1998-NMSC-019, ¶ 9, 125 N.M. 357 (citing *Mack v. State*, 643 So.2d 701, 701 (Fla.Dist.Ct.App.1994)). In this case neither the recusing nor replacement judge made any findings about unusual or exigent circumstances. The *Mack* appellate court, in the context of the Florida rules, found that the absence of any record that the replacement judge was a necessity (rather than a mere convenience) a remand was necessary for re-sentencing by the original

trial judge or the making of record establishing why he was unavailable. While New Mexico does not have a specific rule on the subject of sentencing by a replacement judge, the New Mexico Supreme Court's citation of *Mack* is persuasive authority that there must be a record made of the necessity for sentencing by a different judge.

On these grounds, Mr. Arvizo's case should be remanded for resentencing in front of the original judge at trial, or for the making of a record as to why having another judge sentence him is necessary.

X. Mr. Arvizo's conviction should be overturned for cumulative error

"Cumulative error requires the reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595 (citation omitted). The doctrine of cumulative error is to be strictly applied and the doctrine cannot be invoked is the record as a whole demonstrates that the defendant received a fair trial. *Id.* "We 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." *Id.*

In this case Mr. Arvizo was prevented from having an opportunity to present his defense that A.B. had a motive to make a false accusation. The trial court

impeded the cross-examination of A.B. by unnecessarily requiring the defense to repeatedly refresh her memory. There was insufficient evidence that Mr. Arvizo coerced A.B. or that he was a person in a position of authority. During closing arguments the prosecution highlighted Dr. Ornelas' improper vouching testimony. The video record of Mr. Arvizo's responses to the police was lost. The prosecution made improper references to A.B. as the 'victim' during closing arguments. And, finally, the judge who presided over the trial recused himself only two days after the verdict and a different judge carried out sentencing with no record of whether that was necessary.

In light of all these errors, and taking into account that the only evidence against Mr. Arvizo was the testimony of one witness, his conviction should shock the conscience of the court and should be reversed for cumulative error.

CONCLUSION

WHEREFORE Mr. Arvizo requests that the Court reverse his conviction and remand accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served by hand delivery to the Attorney General's Box in the Court of Appeals this 6 day of March, 2015.

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