



# BRIEF BANK

## WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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**Marital Privilege**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

NRS 49.295 sets forth the marital privilege. However, the statute also sets forth several exceptions which render the privilege inapplicable. NRS 49.295(2) provides in pertinent part:

2. The provisions of Subsection 1 do not apply to a:

...

(e) Criminal proceeding in which one spouse is charged with:

(1) A crime against the person or the property of the other spouse or of a child of either, **or of a child in the custody or control of either**, whether the crime was committed before or during the marriage. (Emphasis added).

In Meador v. State, 101 Nev. 765 (1985), the Nevada Supreme Court addressed the issue at hand.

In that case the defendant was not related to the various female victims, all of whom were between the ages of eight and twelve. Appellant and his own daughter went with the victims on various outings, including swimming, horseback riding, and trips to the movies. The victims also went to the defendant's residence for "stay overs" with the victim's daughter. The defendant's wife and a second daughter also resided with the defendant at the residence.

The defendant was charged with multiple counts of Lewdness and Sexual Assault for allegedly molesting various girls at public swimming pools, at movies, at the ranch where the horseback outing occurred, as well as in his home.

At trial the girls testified that they did not report the incidents immediately because they did not understand what was happening to them, and because they were scared or embarrassed. The victims ranged in age from eight to twelve. At trial an expert testified that the girls' silence was typical of molested children because children under the age of 12 years are not aware of their sexual identities and are incapable of making abstract judgements. The victims were all friends of the defendant's 11-year-old daughter. Meador, Id., at pp. 766-767.

On appeal Meador contended that the District Court erred in allowing his wife to testify against him after he had invoked the marital privilege. The Nevada Supreme Court held that the husband and wife privilege was inapplicable pursuant to Subsection 2(e)(1). (See full quotation above.)

The Nevada Supreme Court stated: The statute plainly provides that the privilege is inapplicable where the spouse invoking the privilege has been charged with a crime against a child in the custody or control of either spouse. The record indicates that appellant had physical control over the girls during the molestations. We conclude that appellant's physical control over the girls at the time of the molestation satisfies the requirements of the exception to the privilege. Meador, Id., at p. 768.

### CONCLUSION

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

**Mayhem Cosmetic Disfigurement**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

RESPONSE TO AND MOTION TO DENY THE PETITION  
WRIT OF HABEAS CORPUS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, Washoe County District Attorney, by and through, \_\_\_\_\_, Deputy District Attorney, and hereby responds to the Defendant's Writ of Habeas Corpus and moves this Court for an Order Denying the Petition for a Writ of Habeas Corpus in the above-mentioned matter. This Response and Motion is based upon the following Points and Authorities.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

**POINTS AND AUTHORITIES**

## STATEMENT OF THE CASE

## STATEMENT OF THE FACTS

## ARGUMENT

The defendant argues that the mayhem charged was not proven at preliminary hearing because 1) the scarring on the face is not mayhem; 2) the victim stated that the scar was the result of the punch instead of the iron; and 3) there was no malice in punching her. Thus, the mayhem charge should be dismissed and there was no use of a deadly weapon to commit mayhem.

In *Clem v. State*, 104 Nev. 351, 760 P.2d 103(1988), the Court was presented with similar facts to the instant case. The

defendant used a hot iron on the victim. The Court said on that set of facts that,

We hereby adopt the same (functional) test for determining whether an instrument is within the category of a "deadly weapon." A heated electric iron and red hot table fork can cause serious bodily injury or death. Sexton's burns evidence that injury. The appellants' intent to **injure and disfigure** with the iron and the fork was clearly illustrated at trial. Appellants' sentences were properly enhanced as these instruments were used as deadly weapons. (Emphasis ours).

In *Levi v. State*, 95 Nev. 746, 602 P.2d 189 (1979), the Court said regarding a burn, In our view, the phrase, "serious permanent disfigurement," includes **cosmetic disfigurement** as well as an injury that is functionally disabling. The child did not want the jurors to see his burned stomach because it was different. The damage apparently was serious in his mind. He was permanently scarred because of pigment loss. It was the jury's province to determine whether the harm was serious as well as permanent. *Gibson v. State*, 95 Nev. 99, 590 P.2d 158 (1979). (Emphasis ours).

Thus, the courts recognized that the burning of the body is a form of mayhem.

In *Lamb v. Cree*, 86 Nev. 179, 66 P.2d 660,(1970), the Court talked about permanent disfigurement.

#### 4. Permanent Disfigurement

NRS 200.300 provides:

'Whenever upon a trial for mayhem it shall appear that the injury inflicted will not result in any permanent disfiguration of appearance, diminution of vigor, or other permanent injury, no conviction for maiming shall be had, but the defendant may be convicted of assault in any degree.' (Emphasis added.)

It is true that the disfigurement in this case was slight, but that was due to the successful plastic surgery that replaced the missing portion of the ear. Absent the plastic surgery, disfigurement may have existed. We do not believe the skill of a surgeon in correcting a disfigurement by plastic surgery should give license to one desirous of committing mayhem. The degree of proof at a preliminary hearing need not be as great as at trial, where every element of the crime must be proved beyond a reasonable doubt. At a preliminary hearing, as we have often held, the evidence

to meet the standard need only show that a crime has been committed and that there exist reasonable grounds to believe the defendant committed it.

The State contends that the victim is not the proper witness to make the determination of what actually caused her injury. For that, the State will have to call an expert witness to examine the victim's medical records and the victim herself in order to arrive at a medical conclusion that the scarring on her face was caused by a blow versus the iron. Both applications of force were employed by the defendant. The outline of an iron is plainly visible on her face in the State's exhibits introduced at the preliminary hearing. She also had a cut on her face in the same location of the burn. At preliminary hearing it wasn't determined which came first, the blow or the burn. But that is of no moment. Both were administered by the defendant.

Without expert testimony, the jury will not know what actually caused the scarring on her face. It is a question of fact whether it is permanent disfigurement.

In Beets v. State, 107 Nev. 957, 821 P.2d 1044(1991), the Court said, Appellant next contends there was insufficient evidence adduced at trial to support the mayhem conviction because there was no evidence presented that Vanita's arm injury was permanent. NRS 200.280 states in pertinent part that "[m]ayhem consists of unlawfully depriving a human being of a member of his body, or **disfiguring** or rendering it useless. If any person cuts out or disables the tongue ... or disables any limb or member of another ... that person is guilty of mayhem...."

Appellant argues the only evidence presented regarding the injury was Vanita's testimony that she had nerve damage and had not regained full ability to lift her wrist at the time of trial. We have previously stated: "Whether the victim is disfigured, and whether the disfigurement is permanent, are questions of fact for the jury." Lomas v. State, 98 Nev. 27, 29, 639 P.2d 551, 552 [107 Nev. 963] (1982). We conclude that the jury had sufficient evidence to find that Vanita's injuries were permanent. See Wilkens, 96 Nev. at 374, 609 P.2d at 313 (1980). (Emphasis ours.)

Malice is defined in NRS 193.0175 as, "Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

The State contends that the defendant's actions towards the victim were done with an evil intent.

Both the blow and the iron contributed to her cosmetic disfigurement.

In Ex parte Ralls, 71 Nev. 276, 288 P.2d 450, (1955) the court determined that, It does not follow that a specific intent to maim must be proved. It may be inferred or presumed. To accomplish such an end, however, it is necessary that the disfigurement was reasonably to be apprehended as the natural and probable consequence of the act. See 36 Am.Jur. 2, Mayhem, § 3; Annotations, 65 Am.St.Rep. 774; L.R.A.1916E, 494.

Further, mutilation has been recognized in a capital case as intentional mayhem that goes "beyond the act of killing." *Browne v. State*, 113 Nev. 305, 933 P.2d 187 (1997). *Deutscher v. State*, 95 Nev. 669, 677, 601 P.2d 407, 412 (1979)

Loose teeth have been determined to be not mayhem. *Buffalo v. State*, 111 Nev. 1139, 901 P.2d 647,(1995) The Court noted further that "Mayhem consists of unlawfully depriving a human being of a member of his body, or disfiguring or rendering it useless." NRS 200.280 (Court's emphasis). The State's attorney correctly argued in final argument that we ordinarily think of a "member" as an "arm or a leg", but that it can also include any "separate and distinct part of someone's body." *Buffalo v. State*, supra.

In *Lomas v. State*, 98 Nev. 27, 639 P.2d 551, the court noted that the fact that the injury is not readily apparent does not preclude a charge of mayhem. The Court stated,

Whether the victim is disfigured, and whether such disfigurement is permanent, are questions of fact for the jury. *Lamb v. Cree*, supra; see *Levi v. State*, 95 Nev. 746, 602 P.2d 189 (1979). The record in the present case reveals that the extent of the injury was far from apparent. We see no justification for the district court's refusal to give an instruction on NRS 200.300.

Finally, as early as in *State v. Enkhous*, 40 Nev. 1, 160 P. 23,(1916), the Court has recognized, To constitute mayhem it is immaterial by what means or instrument or in what manner the injury was inflicted.

### CONCLUSION

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Mere Presence**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

IN THE MATTER OF THE APPLICATION  
OF \_\_\_\_\_, FOR A  
WRIT OF HABEAS CORPUS

Case No.  
  
Dept. No.

\_\_\_\_\_/

POINTS AND AUTHORITIES IN OPPOSITION TO WRIT OF HABEAS CORPUS

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney of Washoe County and \_\_\_\_\_, Deputy District Attorney and hereby submits the attached Points and Authorities in opposition to defendant's authorities filed \_\_\_\_\_. This Opposition is based upon the attached authority, all pleadings and papers on file herein and any argument heard on the matter.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**POINTS AND AUTHORITIES**  
STATEMENT OF THE CASE  
STATEMENT OF FACTS

## ARGUMENT

### A. LEGAL STANDARD

At Preliminary Examination, there must be evidence adduced which establishes probable cause to believe that both an offense has been committed and that the defendant committed it. NRS 171.206. The evidence establishing probable cause may be based on merely slight or marginal evidence because it does not involve a determination of guilt or innocence of an accused. Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996).<sup>1</sup> The State is not required to negate all inferences which might be available as a defense, or explain a defendant's conduct but only to present enough evidence to support a reasonable inference that the accused committed an offense. Brymer v. Sheriff, 92 Nev. 598, 599, 555 P.2d 844 (1976), citing, Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971).<sup>2</sup> For Writ analysis purposes, "(W)e are not now concerned with the prospect that the evidence presently in the record may, by itself, be insufficient to sustain a conviction." McDonald v. Sheriff, 89 Nev. 326, 327, 512 P.2d 774, 775 (1973).

### B. ANALYSIS

The issue here is whether constructive possession of a trafficking quantity of cocaine was demonstrated at Preliminary Hearing. Because of the sworn testimony offered and reasonable inferences therefrom, the State contends that the Justice of the Peace properly determined that probable cause existed to hold the defendant for trial on Counts I and II.

"Possession may be actual or constructive. The accused has constructive possession only if she maintains control or a right to control the contraband...The accused is also deemed to have the same possession as any person actually possessing the narcotic pursuant to her direction or permission where she retains the right to exercise dominion or control over the property." Glispey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1973), citing People v. Showers, 440 P.2d 939 (Cal.1968).

The essential component of constructive possession is a person who "maintains control or a right to control the contraband." Sheriff v. Shade, 109 Nev. 826, 858 P.2d 840 (1993). This is opposed to "mere presence in the area where the

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<sup>1</sup>Citing, Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178 (1980). See also, Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971), citing Marcum v. Sheriff, 85 Nev. 175, 451 P.2d 845 (1969).

<sup>2</sup>Citing Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966).

narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession." Sheriff v. Steward, 109 Nev. 831, 858 P.2d 48 (1993) citing Konold v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1978).

While mere presence is insufficient to hold an accused, it is a factor to be considered in the totality of the circumstances offered. An accused's "presence, companionship and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred." Archie v. Sheriff, 92 Nev. 613, 614, 555 P.2d 1233, 1234 (1976). Accord, Edwards v. State, 90 Nev. 255, 524 P.2d 328 (1974). Additionally, two or more persons may have joint possession of a narcotic if jointly and knowingly they have its dominion and control. Maskaly v. State, 85 Nev. 111, 114, 450 P.2d 790, 792 (1969), citing Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Miranda**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

### DEFENDANT'S STATEMENTS WERE VOLUNTARY

In order to be admissible at trial as substantive evidence or even for impeachment, a defendant's pre-trial statements must be determined to have been voluntarily made. See, Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978). The State is required to prove voluntariness by a preponderance of the evidence based upon the totality of the circumstances. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972); Brimmage v. State, 92 Nev. 434 (1977).

Plaintiff is aware of absolutely no legal basis upon which defendant could be claiming his statements were involuntary. Certainly no coercion or trickery could be claimed. No promises of leniency or other promises or threats were made to him to induce him to give any of the statements. Defendant was not injured or under the influence of drugs or alcohol. In sum, defendant was not compelled in any way to make these statements. If he felt forced to do so or uncomfortable in any way, all he had to do is say "goodbye" and hang up the phone. Cf., Alward v. State, 112 Nev. 141 (1996); Passama v. State, 103 Nev. 212 (1987).

In order to be voluntary, a statement simply must be the product of a rational intellect and free will. Rowbotton v. State, 105 Nev. 472, 482 (1989). Sandoval cannot possibly make a plausible argument that his will was overborne.

### MIRANDA RIGHTS WERE NOT REQUIRED

It is well settled that recitation of the Miranda warnings and a waiver of Fifth Amendment rights are only required when a person is in custody and being interrogated by law enforcement officials. As stated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), "By custodial interrogation, we mean questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added).

It would be impossible to suggest that defendant was deprived of his freedom in a telephone conversation. The test for Miranda custody is how a reasonable person in the suspect's position would have understood his situation based upon the totality of the circumstances. Critical factors would include where the interrogation takes place, whether objective indicia of arrest are present, as well as the length and form of questioning. See Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984); Alward v. State, supra.

Although the fact that the investigation is focused upon the individual questioned can be a factor in this totality of circumstances, police officers are not required to administer Miranda warnings to everyone they

suspect of a crime. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711 (1977). The critical question is, "was the person in a custodial setting?"

In Beckwith v. U.S., 425 U.S. 341, 96 S.Ct. 1612 (1976), it was conceded that Beckwith was the focus of a criminal IRS investigation, but primarily because he was interrogated at his home rather than the police station, the high court determined that no Miranda warnings were required.

Rarely will Miranda rights be required even during investigative detentions. Peace officers are permitted to question a suspect about the circumstances of a crime. See, NRS 171.123(3); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). Miranda is limited to those situations in which there has been such a restriction on a person's freedom as to render him "in custody", not merely a temporary detention for investigation. See, Oregon v. Mathiason, supra, at 429 U.S. 495.

In U.S. v. Bautista, 684 F.2d 1286 (9th Cir. 1982), two suspects were detained for investigation of bank robbery. Both were frisked and handcuffed for officer safety, but were not placed under arrest before being interrogated by officers. No Miranda warnings were given. The admission of the suspects' statements was upheld by the Ninth Circuit Court of Appeals. The Court, citing Oregon v. Mathiason, supra, stated that detentions, "though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates Miranda warnings. At page 1291.

There is absolutely nothing improper with the police even purposely attempting to elicit incriminating evidence in a non-custodial interview without first advising a suspect of his Miranda rights. See, Minnesota v. Murphy, 485 U.S. 420, 104 S.Ct. 1136 (1984).

### CONCLUSION

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Miranda Interrogation Spontaneous Remarks**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

OPPOSITION TO MOTION TO SUPPRESS

COMES NOW, the State of Nevada by and through RICHARD A. GAMMICK, District Attorney  
of Washoe County and \_\_\_\_\_, Deputy District Attorney and hereby submits its opposition to  
defendant's motion to suppress.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**POINTS AND AUTHORITIES**  
**I. STATEMENT OF FACTS**

**II. ARGUMENT AND AUTHORITY**

The Miranda rule bars prosecution from using statements "stemming from custodial interrogation." Miranda, supra. Nevada law is in accord. "The ruling of Miranda applies to statements taken during a "custodial interrogation," which the Court defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Holyfield v. State, 101 Nev. 793, 711 P.2d 834 (1985). Here, "custody"<sup>3</sup> is not at issue at the point identified by the defense (MTS 12/1-2), however, "interrogation" is.

The State agrees that the defendant was "in-custody" at the time Sergeant Asher advised the defendant of his Miranda rights. Nika v. State, 113 Nev. 1424, 951 P.2d 1047 (1997).<sup>4</sup> As such, any statements made by the defendant while in custody that were not the product of interrogation by law enforcement are not subject to the Miranda prohibition.

The State contends that the statements made to Officer \_\_\_\_\_ were statements made spontaneously by the defendant and of his own volition. Therefore, the statements are not the product of express questioning nor the "functional equivalent." Weathers v. State, 105 Nev. 199, 772 P.2d 1294 (1989).

Additionally, while statements procured in violation of the Miranda rule may not be used in the State's case-in-chief, they are admissible to impeach any conflicting testimony by the defendant. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971). Accord, Allan v. State, 103 Nev. 512, 746 P.2d 138 (1987). Accordingly,

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<sup>3</sup>"Custody" in Nevada law is well-defined. "Rather, an individual is deemed in custody where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave. (citations omitted). A suspect's or the police's subjective view of the circumstances does not determine whether the suspect is in custody." State v. Taylor, 114 Nev. 1071, 968 P.2d 315 (1998). See also, Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

<sup>4</sup>"Unless and until the Miranda rights are given and a waiver of those rights is obtained, no evidence procured as a result of the interrogation can be used against the defendant." Nika, supra, citing Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966).

the State reserves the right to introduce any such rebuttal evidence should the defendant elect to take the stand and testify contrary to statements attributed to him by law enforcement.

III. CONCLUSION

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Miranda Intoxicated Suspect Voluntariness**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

### III. ARGUMENT

Once a suspect has been apprised of his Miranda rights, he must affirmatively waive them prior to being interrogated. Stringer v. State, 108 Nev. 413, 417 (1992). The State need only prove that he waived his Fifth Amendment rights against self-incrimination by a preponderance of the evidence. Colorado v. I Connelly, 479 U.S. 157, 168, 107 S.Ct. 515, 522 (1986); Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972); Scott v. State, 92 Nev. 552, 554 (1976)

The validity of the waiver must be determined in each case through an examination of the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981); Rowbottom v. State, 105 Nev. 472(1989)

In citing Falcon v. State, 110 Nev. 530 (1994), Matter goes far beyond the holding of the Court to support his position. In that case, Falcon's conviction was affirmed and the Court held that defendant's waiver of his Fifth Amendment rights was knowingly and intelligently made. Falcon claimed that due to his ingestion of drugs prior to arrest the waiver could not have been knowingly and intelligently given.

After pointing out that the validity of a waiver must be decided on a case-by-case basis and the State must prove it by a preponderance of the evidence, the Court cited Stewart v. State, 92 Nev. 168, 170-171 (1976), for the proposition that, "Mere intoxication will not preclude the admission of defendant's statements unless it is shown that the intoxication was so severe as to prevent the defendant from understanding his statements or his rights."

The Nevada Supreme Court in Falcon v. State, su~ra,

cited to an Arizona Supreme Court case in which the admission of defendant's statements were upheld even though he had a 0.24 percent blood alcohol level. See State v. Clark, 517 P.2d 1238, 1240 (1974)

In Anderson v. State, 109 Nev. 1129 (1993), the defendant claimed his waiver was not knowingly and intelligently made due to the fact that his blood alcohol level was 0.088 percent, he was only twenty-six years old, had no experience with the criminal justice system, and at the time was being treated in the hospital for head injuries sustained in a serious traffic accident which resulted in three deaths. The Supreme Court disagreed noting in part that the defendant was responsive to the questions asked and aware of the importance of his statements. Therein, the Court cited the case of State v. Rivera, 733 P.2d 1090, 1096 (Ariz. 1987), in which the defendant was clearly intoxicated yet found to have intelligently and knowingly waived his Miranda rights.

Thus, it is clear that although Notter wants this Court to believe that intoxication precludes a knowledgeable and intelligent waiver of a constitutional right, this is simply not the law. In fact if it was, no DUI suspect or user of a controlled substance or even a prescription drug could ever be properly interviewed or consent to a search.

A confession obtained while under the influence of narcotics is governed by much the same rule as a confession made under the influence of intoxicating liquors. The effect of narcotics relate generally to the credibility to be given the confession, rather than its admissibility. 23 C.J.S. Crim. Law. §828, p. 228.

The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Miranda warnings insure that a waiver of these rights is knowing and intelligent by fully advising the

suspect of this constitutional privilege, including the critical advice that whatever he chooses to say may be used against him and that he has the right to remain silent and have counsel present.

Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he knew he could stand mute and have the assistance of counsel, and that he was aware of the State's intention to use his statements against him, the analysis is complete and the waiver is valid as a matter of law. "Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135 (1986)

In Colorado v. Connelly, *supra*, the United States Supreme Court overturned a Colorado Supreme Court's decision upholding the trial court's suppression of defendant's statements as not being a product of a "rational intellect and free will." The State courts had ruled that Connelly's impaired mental ability (psychological) precluded his ability to make a valid waiver of his Miranda rights.

Unlike the instant matter, this case revolves solely around the issue of the voluntariness of the defendant's statements, and the Court in finding them to be voluntary made the following statement, "Only if we were to establish a brand new constitutional right - - the right of a criminal defendant to confess to his crime only when totally rational and properly motivated -- could respondent's present claim be sustained." 479 U.S. 1GG, 107 S.Ct. 521.

Proof that the accused was intoxicated at the time he made the statement will not, without more, prevent the admission of his statement.

Before such a statement will be held to be inadmissible, it must be shown that the accused was intoxicated to such an extent that he was unable to understand the meaning of his comments. Of course, the jury may consider intoxication in determining whether the statements are true or false. (Citations omitted) . State v. Hicks, 649 P.2d 267, 275 (Ariz. 1982) (Upholding admissibility of

defendant's statements in spite of a 0.26 percent blood alcohol level, some difficulty answering questions and inability to remember his address).

In State v. Clark, 434 P.2d 636, 639 (Ariz. 1967), the Court upheld the admission of defendant's statements made while he was intoxicated and had a 0.38 percent blood alcohol level, stating, "certainly any man who can manufacture the excuse that bloodstains on a shirt came from his wife's mouth after having her teeth pulled has the control over his mental faculties to understand what he is saying."

In U.S. v. Short, 947 F.2d 1445 (10th Cir. 1991), the defendant was interviewed following an apparent waiver of his Miranda rights. He had been in a serious motorcycle accident nine days before and hospitalized for five days. He was still in numerous casts for broken bones and had one hundred facial stitches. He was on doctor-prescribed Percodan and Hydracodeine for the pain. Defendant claimed he was in a great deal of pain, drowsy, relaxed and would often forget where he was. The officers acknowledged he looked like he was in pain, "but he never stated he was in an over abundance of pain whatsoever."

**Misdo Jury Trial**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

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RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

The Supreme Court of the United States has long held that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968). In determining whether or not a crime is "petty" the Supreme Court has found that the most relevant criterion is the severity of the maximum authorized penalty fixed by the legislature. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

In evaluating this criteria the Supreme Court has held that: "a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." Blanton v. City of North Las Vegas, Nevada, 489 U.S. 538, 542, 109 S.Ct. 1289, 1293, 103 L.Ed.2d 550 (1989). The Supreme Court recognizes that a prison term of six months or less "will seldom be viewed by the defendant as 'trivial or petty.'" Baldwin, at 73, 90 S.Ct., at 1890. But the Supreme Court has found that the burdens of such a sentence, "onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." Ibid.; see also Duncan, supra, 391 U.S., at 160, 88 S.Ct., at 1453.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
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By \_\_\_\_\_

Deputy District Attorney

012025922

**Multiple Theories Criminal Conduct**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
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\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

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District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

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**III. ARGUMENT**

**MULTIPLE THEORIES ARE PERMISSIBLE**

The State is permitted to allege multiple theories of criminal conduct. The United States Supreme Court in Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 2499 (1991), held "if a state's courts have determined that certain statutory

alternatives are mere means of committing a single offense, rather than independent elements of a crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." As the instant motion correctly states, the Nevada Supreme Court decision recently in Labastida v. State, 112 Nev. 1502 (1996) held that, as a matter of law, child abuse and/or failure to prevent child abuse and/or failure to render medical treatment to said child is sufficient for a conviction of murder.

The Nevada Supreme Court has specifically adopted the logic of Schad in Evans v. State, 113 Nev. Ad. Op. 98 (August 28, 1997). There the court held "[W]e hold that the district court did not error in failing to separately instruct the jury on premeditated murder, a felony murder, and aiding and abetting murder, or to require unanimity on any one of the individual theories of culpability." Thus, the State is only required to put the defendant on notice as to the several different theories that it possesses in this case. It has done so in Count I of the Indictment, therefore, to answer the instant motion's question, the defense should be prepared to defend against all theories as alleged in Count I.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**News Media Privilege**

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

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Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

At the oral argument concerning this matter, plaintiff mentioned a quote from Branzburg vs. Hayes, 408 U.S. 665, 92 S. Ct. 2646 (1972), dealing with the First Amendment to the United States Constitution. HT, p.11. Mr. Gentile rebuffed Branzburg and claimed that his argument is not based upon a constitutional privilege, but purely a statutory one under NRS 48.275 and a Nevada case interpreting that statute, Las Vegas Sun, Inc. vs. Eighth Judicial District Court, 104 Nev. 508 (1988). HT, pp.14-18.

Recognizing that the Nevada Supreme Court does not agree with his overly-broad interpretation of NRS 48.275, Mr. Gentile now briefs this issue almost entirely in the context of a First Amendment claim. For purposes of this Opposition, Plaintiff will reply briefly to his state claim and then respond to his contentions based upon the U.S. Constitution.

#### **NEVADA'S NEWS MEDIA PRIVILEGE WAS DESIGNED TO PROTECT CONFIDENTIALITY**

Both of the Nevada cases dealing with Nevada's news media privilege (NRS 49.275) provide that it applies to confidential communications and confidential sources only. In Newburn v. Howard Hughes Medical Institute, 95 Nev. 368 (1979), the court indicated that there would be no privilege to assert if the communication was not claimed to be confidential.

Nine years after Newburn, the Nevada Supreme Court stated, "The legislative history behind the current shield law illustrates the legislators' concern with protecting confidentiality... The legislative intent to protect confidentiality of the materials and sources necessary to carry on the news gathering process in a manner which best serves the public is clear from the relevant history and the statute itself." Las Vegas Sun, Inc. vs. Eighth Judicial District Court, supra. The court cited to the Senate Judiciary Committee minutes of March 4, 1969, as does Sunbelt in support of its argument to the contrary.

The Las Vegas Sun decision was Mr. Gentile's sole case authority at the oral argument hearing of September 28, 1998. However, he now vigorously attacks and distinguishes that case, clearly revealing that his claim lacks merit and demonstrating why he has switched gears into an argument based not upon the statute but upon the U.S. Constitution.

///

EVEN IF A PRIVILEGE DID EXIST, IT WAS WAIVED

The holdings and legal rulings in Las Vegas Sun are stated on p.513 as follows:

Today we again hold that a waiver under NRS 49.385 applies to the news gatherers' privilege... [W]e note that a privilege may be waived even in the absence of a waiver statute... When a newspaper or broadcaster names its source and quotes statements made by that source, the underlying purpose of the shield law is vitiated and the statutory privilege is waived. There is no claim of confidentiality to be made under these circumstances... Citations omitted. Emphasis added.

The distinguishing feature in that case is that the news media claimed that the outtakes, notes and background information were still privileged since they hadn't been disclosed. For purposes of civil pretrial discovery, the court agreed and protected the confidentiality of these materials. The court could not find that the information contained in these materials was disclosed in "significant part" simply by disclosing a source and the remarks made by that source.

However, in the instant case, it is clear that no claim of confidentiality is being made as to any material, including the outtakes. Second, airing major portions of the content of Bazile's interview involved a "disclosure of any significant part" of the information being requested, clearly constituting waiver under NRS 49.385. See, Cheyenne Construction vs. Hozz, 102 Nev. 308, 11-12 (1986) (if there is disclosure of privileged [attorney-client] communications, this waives the remainder of the privilege on the same subject). Thus, unlike the facts of Las Vegas Sun, there is simply no reason to shield or protect any information from Bazile's interview.

Sunbelt asserts that NRS 49.385 only provides for waiver when a confidential communication is divulged. The Nevada Supreme Court has stated in no uncertain terms that this claim is without merit.

We conclude the legislature meant the waiver statute to apply to all of the privileges included in Chapter 49, although on its face it appears to refer only to 'confidential' matters. Las Vegas Sun, at p.511 fn.2.

Newburn also contented that the media privilege was absolute and not subject to waiver within the intendment of NRS 49.385. The court stated, "We summarily reject this contention. All privileges recognized by NRS Chapter 49 are explicitly subject to the waiver provisions of NRS 49.385." Newburn, supra, at p.371. Cf. Sunbelt's cited case of In re Schuman, 552 A.2d 602 (N.J. 1989)(Disclosure which is privileged itself is not a waiver). Obviously, Nevada does not recognize that all media disclosures are themselves privileged, thereby preventing a finding of waiver. Disclosure of any privileged communication constitutes waiver in Nevada. Las

Vegas Sun, supra. The Nevada Supreme Court in Las Vegas Sun clearly rejected the argument that a reporter's privilege is absolute, while the New Jersey Supreme Court has determined that "The newperson's statutory privilege not to disclose confidential information is absolute." That decision was based upon New Jersey's statutes and the legislative history behind them, which specifically exempt compelled disclosure by the government, unlike Nevada's.

The Las Vegas Sun court also noted that any such "privilege may be waived even in the absence of a statute". At p.513. Thus, Sunbelt again errs in suggesting that waiver by disclosure is limited to the provision of NRS 49.385. Clearly, NRS 49.385 provides one method of waiver by disclosure but does not preclude or prohibit a finding of waiver in other circumstances. NRS 49.385 certainly does not provide that a privilege can only be waived if the communication was confidential, as Sunbelt contends. There is simply no legal reason or justifiable basis to ignore such a clear case of waiver herein.

In sum, under Nevada statutory law, no media privilege exists as to nonconfidential communications. If this court should extend the privilege into such matters, any privilege was waived by disclosure of the information. It would be senseless to conclude that a privilege applies even to nonconfidential matters but that it can never be waived by disclosure. If NRS 49.275 truly provides for a testimonial privilege, then waiver must not depend on the status of the communication as confidential or non-confidential, but must apply equally dependent upon whether the information was previously disclosed. See Las Vegas Sun, supra, (Nevada's waiver provisions apply to all privileges, confidential or not).

#### NO CONSTITUTIONAL PROTECTION EXISTS

State and federal constitutional provisions provide no additional support to the reporter's claim of privilege as to nonconfidential information in a criminal case. Even Sunbelt's cited case, In re Schuman, 552 A.2d 602 (N.J. 1989), recognized this and determined that the reporter who had published the information had waived its claim under the First Amendment, stating in fn.7 on p.606, the U.S. Supreme Court has "held that a partial disclosure of any part of the privileged material constitutes a waiver of a newperson's privilege under the First Amendment," and further stating that "this case rests on statutory rather than constitutional grounds."

Further, the weight of authority has refused to recognize a First Amendment privilege in criminal cases at all. The seminal federal case on point is Branzburg v. Hayes, supra, which involved grand jury

subpoenas to various newsmen. Our Highest Court specifically held therein that requiring newsmen to appear and testify--even about confidential information--before state or federal grand juries does not abridge First Amendment freedom of speech or press. Newsmen were determined to have the same obligation as other citizens to respond to grand jury and trial subpoenas and to answer questions relevant to the commission of a crime. Asked to create a First Amendment privilege granting newsmen a testimonial privilege that ordinary citizens don't possess in said situations, the Court answered, "This we decline to do." 408 U.S. 691.

The balancing test suggested in the Branzburg concurring opinion written by Justice Powell was presented by plaintiff in its original Memorandum of Points and Authorities as one approach to Nevada statutory recognition of privilege and waiver, if neither was deemed by this court to be absolute. It clearly was not determined by the majority of the Branzburg Court to be necessary in assessing a First Amendment claim of privilege since no privilege to the press in criminal cases was even recognized by the court.

Branzburg specifically rejected in criminal cases, a news reporter's testimonial privilege conditional upon the prosecutor to establish relevancy, unavailability from other sources and a compelling need. See, In re Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987).

"News reporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases." U.S. v. Smith, 135 F.3d 963 (5th Cir. 1998). In Smith, the Fifth Circuit distinguished civil matters from criminal prosecutions stating,

The Branzburg Court emphasized that the public's interest in effective law enforcement outweighed the press's entitlement to a First Amendment privilege against the disclosure of information. Because the public has much less of an interest in the outcome of civil litigation ... the interests of the press may weigh far more heavily in favor of some sort of privilege [in civil cases]. Citations omitted. 135 F.2d 972.

The court also acknowledged Sunbelt's cited authorities of U.S. v. LaRouche, 841 F.2d 1176 (1st Cir. 1988) and U.S. vs. Cuthbertson, 630 F.2d 139 (3rd Cir. 1980), convincingly suggesting that they were wrongfully decided in constructing a qualified news reporter's privilege in criminal cases based solely upon Justice Powell's concurring opinion in Branzburg. See also In re Grand Jury Proceedings, *supra*.

In finding that Branzburg precludes such a privilege in criminal cases, the Fifth Circuit cited several other United States Supreme Court cases suggesting that no balancing test or showing of special relevance or need is required because there is no such recognized privilege. See 135 F.2d 973, fn.1; University of Pennsylvania

v. E.E.O.C., 493 U.S. 182, 201, 110 S.Ct. 577, 588-89 (1990); New York Times Company v. Jascalvich, 439 U.S. 1301, 1302, 98 S.Ct. 3058, 3059-60 (1978).

Interestingly, the Fifth Circuit court cited Sunbelt's authority, Shoen II, 48 F.3d 412 (1995), (in fn.2) and a similar case in its own circuit, Miller vs. Transamerican Press, Inc., 621 F.2d 721 (1980), both of which adopted a three part balancing test suggested herein by Sunbelt. The court vehemently declined to extend to criminal cases a qualified privilege based upon that test, stating,

In Miller, we held that in civil libel suits, reporters possess a qualified privilege not to disclose the identity of confidential informants. To defeat this privilege, the discoverer must show that: 1) the information is relevant; 2) it cannot be obtained by alternative means; and 3) there is a compelling interest in the information... we disagree that Miller controls this case, as the Miller privilege differs from the privilege sought here in two critical respects. First, Miller was a civil matter, while we have before us a criminal prosecution. 135 F.2d 971-972.

The court in Shoen II strongly suggests the limits of the qualified privilege and this balancing test to civil cases by references such as "a civil litigant's interest," and similar phrases within the text of the opinion. The current weight of authority is certainly that Branzburg cannot and should not be extended past this recognized public policy barrier.

Moreover, Sunbelt makes a weak argument that the Shoen II test would be the proper test to apply even if it was determined necessary by this court to balance the competing interests in a criminal case.

#### BALANCING TEST

Even is this court should adopt and apply a balancing test for disclosure of nonconfidential information in a criminal case under a claim of either constitutional or statutory mandates, a balance must be struck in favor of the interests of justice in a criminal trial.

The majority opinion in Branzburg signed by Powell and enhanced by his concurring opinion, identifies merely a First Amendment protection against "official harassment of the press undertaken not for purposes of law enforcement..." 408 U.S. at 707, 8, 92 S.Ct. 2670. Any argument that this suggests a balancing approach in a criminal case is easily dismissed simply by reviewing 1) whether the reporter is being harassed, 2) whether the subpoena and information sought is in good faith, 3) whether there is more than simply a remote and tenuous relationship to the investigation, and 4) whether a legitimate law enforcement need will be served by forced disclosure. See In re Grand Jury Proceedings, supra, at p.586.

In re Grand Jury Proceedings, supra, involves a murder case in which the State caused a television reporter to be subpoenaed to produce videotapes, some of the footage having been aired in television broadcasts. The court held that the lower court which applied the aforementioned test was correct in ordering compliance by the reporter and further determined that a qualified testimonial privilege did not exist. However, the public's interests in law enforcement was found to be so compelling in that case that even the balancing test suggested by the reporter (similar to Sunbelt's herein) would result in an order favoring disclosure, according to the court.

In the instant case, all four factors of In re Grand Jury Proceedings are easily satisfied. See attached affidavit of David W. Clifton.

The Ninth Circuit has also adopted this same approach in criminal cases as to confidential information. See In re Grand Jury Proceedings, 5 F.3d 397, 400-401 (9th Cir. 1993) decided the same year as Shoen I; In re Lewis, 501 F.2d 418 (9th Cir. 1974) (Lewis I) and In re Lewis, 517 F.2d 236 (9th Cir. 1975) (Lewis II)

Even under the civil balancing test of Shoen II, plaintiff does not have any reasonable alternative or cumulative sources to the specific information divulged by defendant Bazile to Victoria Campbell.

Little if any evidence ties Bazile to the body or crime scene, partly because the body was found weeks after and miles away from the murder scene. The only alleged eyewitness is an admitted drug user who did not report the murder of her best friend for approximately six weeks. She is now deceased and Bazile has filed a motion to exclude her testimony.

Although Bazile told police he killed Judith Laine, he also told them at length that he didn't. He has also pled not guilty to the crime. Differing, in fact diametrically opposing, statements to the police in and of itself makes Bazile's statements to an independent and credible source (Victoria Campbell) much more critical and noncumulative.

Plaintiff's interviews with witnesses endorsed by defendant for testimony at trial as well as physical exhibits provided to the State by the defense strongly suggests that Bazile has previously told people and is going to claim that he did not commit the murder and was merely protecting Fondy (the eyewitness) by taking the rap for her due to his affection, duty and loyalty to her. Yet in the interview with Channel 4, Bazile is quoted many times in revealing his dislike for Fondy.

Very important here also is the fact that Bazile's interview with Channel 4 was completely voluntary and after the police interview, for which Bazile is requesting a Jackson vs. Denno hearing on

voluntariness. Thus, it provides proof that his statements that he murdered Laine were truthful and not coerced by police--an issue ultimately to be decided by the jury.

Sunbelt attempts to shift the burden onto the State to prove absolute necessity for this evidence. However, even assuming Sunbelt was correct in its legal contentions, the balancing of interests cannot ignore that no chilling effect would result from compliance with the subpoena. No chilling effect results from the disclosure of statements which were made for publication without any expectation of confidentiality. LaRouche, supra, at p.1181.

It is difficult to perceive what effect the subpoena on Victoria Campbell would have on her or Sunbelt's ability to seek vigorous and open discussion of news stories. How could compelling her testimony abridge her freedom of the press when both she and Bazile fully expected disclosure of any or all of his statements to her? Would persons in Bazile's shoes really be less inclined to be interviewed because they expected their statements to be played on the news but not in the courtroom? To the contrary, Bazile knew when he made his comments to Channel 4 that they could be used against him on the news and in any future criminal trial.

Even Sunbelt's case authorities recognize that the absence of confidentiality is an important element in this balancing equation. See Cuthbertson and LaRouche. It is also important to note that in neither of these two cases did the courts use the strict balancing approach utilized in the Shoen II civil case. In sum, Victoria Campbell and Sunbelt Communications simply have no real need nor actual remaining privilege for her to refuse to testify.

### CONCLUSION

Although Sunbelt specifically excluded First Amendment claims in oral argument, it now feels the need to enhance its Nevada statutory claim. This is obviously due to Sunbelt's recognition that there may not be a reporter's shield law on nonconfidential matters, nor a need for one. Secondly, even if it was determined to exist, such a privilege can be waived by the reporter's voluntary disclosure of the information, which obviously occurred in this case.

Branzburg involves grand jury subpoenas in a criminal matter, holding that the government does not have any burden under the First Amendment to show a compelling need or special relevance for the information sought. Shoen II does not alter that ruling and is expressly limited to civil cases. In the 9th Circuit, In Re Grand Jury Proceedings, 5 F.2d 397 clearly controls over a claim of news reporter's privilege in a criminal case. Arguably, this should be the end of the discussion under both state and federal claims by Sunbelt. However, because Las

Vegas Sun balanced the interests (although only in its civil setting), plaintiff suggested in its original Memorandum that alternatively a balancing approach could be considered as a last resort--although certainly not one designed for civil libel suits, other civil cases or strictly confidential sources or information, as is now submitted by Sunbelt under the guise of the First Amendment.

Plaintiff has provided recent cases from various circuits dealing with nonconfidential information in criminal cases. Uniformly, these cases reject a compelling needs test. As the Smith court distinguished its previous Miller decision, which utilized a similar Shoen II balancing test, there should be no doubt that the Ninth Circuit similarly confines Shoen II to noncriminal cases, as that case itself is. The Ninth Circuit, Sixth Circuit and Fifth Circuit have all confronted this issue and have convincingly ruled in favor of law enforcement and the public's interests in obtaining criminal evidence and justice. As in the instant case, in U.S. v. Smith supra, the government had subpoenaed the unbroadcast portions of a defendant's videotaped interview. The Court, without dissent, held that the press did not even enjoy a qualified privilege not to disclose nonconfidential information in criminal cases.

Sunbelt, on the other hand, argues this balancing test by combining the holding of a noncriminal case (ie. Shoen II) with criminal case authority. However, the Shoen II decision doesn't reveal even a glimmer of hope toward applying the compelling needs test in a criminal context. Branzburg, as acknowledged in many other cases, drew the line at this point.

Applying any balancing test, this court has ample evidence before it to find in favor of the interests of criminal justice. Calling reporters to give testimony in a criminal trial or grand jury proceeding in this matter and for the reasons that other citizens are called, bears a reasonable relationship to the achievement of governmental purpose and the governmental interests in such a role is compelling in paramount. Branzburg, supra.

Based upon the foregoing, it is hereby respectfully requested that Sunbelt's Motion to Quash or Modify Scope of Subpoena be denied.

**Notice of Witnesses**

CODE

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Dept. No.

Defendant.

\_\_\_\_\_ /

**NOTICE OF WITNESSES PURSUANT TO NRS 174.234**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and offers this Notice of Witness given pursuant to NRS 174.234.

**Notice of Expert Witness**

CODE

Richard A. Gammick

#001510

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Reno, NV 89520-3083

(775) 328-3200

Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**NOTICE OF EXPERT WITNESSES PURSUANT TO NRS 174.234**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and \_\_\_\_\_, Deputy District Attorney, and hereby gives notice of the name of the expert witness intended to be called during the State's case-in-chief. A curriculum vitae of the proposed witness is attached hereto.

**Opening Statement Permissible Evidence**

CODE  
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

The purpose of opening statement is to prepare the jurors' minds to follow the evidence and to be able to discern its materiality, force and effect. Because the presentation of such evidence in Opening Statement would aid that purpose for the jurors, the court has the discretion to permit the use of admissible evidence by the court in Opening Statement. In People v. Green, 47 Cal.2d 209, 302 P.2d 307 (1956), the prosecutor showed a motion picture in opening statement which revealed the location where a robbery took place. He also showed the jury objects that later would be marked as exhibits, and photographs of the victim's wounds and a photograph of the defendant in prison garb. The California Supreme Court ruled that it was within the trial court's discretion to permit the use of such items in Opening Statement.

The court of appeal followed the same logic in People v. Kirk 43 Cal.App.3d 921, at 929, 117 Cal.Rptr. 345 (1974). In permitting the use of a tape recording in opening statement. The defendant was charged and convicted of various counts of grand theft stemming from false insurance claims. During opening statement, the prosecutor played portions of a tape sent by the defendant to a friend. In those portions, the defendant spoke of his criminal plans. On appeal, the defendant complained about the prosecutor playing the tape in opening before it had been authenticated. The court of appeal found no error.

In People v. Fauber 831 P.2d 249, 9 Cal.Rptr.2d 24, 2 Cal.4th 792 (Cal. 1992), a key piece of evidence in the murder case was the testimony of a man named Rowan. Rowan had testified at the preliminary hearing under a grant of immunity. When discussing Rowan in opening statement, the prosecutor put up a blow up of a page of Rowan's preliminary hearing transcript testimony highlighting the most incriminating portions. The defendant appealed and claimed use of this exhibit in opening statement was improper. The Supreme Court ruled it was proper. The Court noted that it is axiomatic that nothing said in opening statement is evidence, and that there could have been no valid objection if the prosecutor had merely read the evidence. The Court rejected the argument that the use of the evidence preconditioned the jury to accept Rowan's testimony. The Court also dismissed the contention that the mere appearance of the poster was so official that it caused the jury to prejudge Rowan's credibility.

In People v. Wash, 6 Cal.4th 215, at 257, 24 Cal.Rptr.2d 421, 861 P.2d 1107 (1993), the California Supreme Court approved the use of a multi-media presentation in opening statement in the penalty phase of a murder trial.

**CONCLUSION**

Though there is no specific case involving this issue in Nevada, it is within the court's discretion to permit the use of evidence ruled admissible by the court in Opening Statement. Therefore, based on the foregoing law, the State requests that the evidence be admitted, and that the State be permitted to present the 911 tape in opening statement.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Other Acts Sex Offense**

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK

District Attorney

Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)

Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

NRS 48.045(2) provides:

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

The Supreme Court of Nevada has held that admission of other similar crimes to the ones for which the defendant is on trial is "...admissible only if relevant for some purpose other than to show the accused probably committed the crime because he is of a criminal character." McMichael v. State, 94 Nev. 184, 188, 577 P.2d 398, 400 (1978). Further, the Court has held that the trial court must hold a hearing outside the presence of the jury to determine if the evidence of the defendant's uncharged misconduct is admissible on the basis of one of the enumerated exceptions to the prohibition set out in NRS 48.045(2). Moreover, the Court has held that the State must prove this uncharged misconduct by plain, clear, and convincing evidence. Finally, the Court has held that the trial court must determine that the probative value of the evidence of the defendant's uncharged misconduct outweighs the prejudicial effect such introduction of such evidence would have on the defendant's right to a fair trial. See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

#### **1. Admissibility of Defendant's Prior Uncharged Misconduct.**

- a. To Prove Defendant's Criminal Intent. The Supreme Court of Nevada has held that evidence of the defendant's prior sexual misconduct is relevant to prove the defendant's criminal intent in a trial of the defendant on the charge of sexual assault. In Keeney v. State, 109 Nev. 220, 850 P.2d 311 (1993), the Supreme Court held that the defendant placed the issue of his criminal intent into controversy when he entered his plea of not guilty to the charge of sexual assault. See Keeney, 109 Nev. at 228, 850 P.2d at 316. In Keeney, the defendant was charged with six counts of sexual assault on a child. These crimes were alleged to have occurred during November 1989, after Keeney befriended the three victims and their parents who were

enroute to Las Vegas, Nevada. Later that month, Keeney visited this family at their motel room in Las Vegas. At that time and place, he allegedly sexually assaulted the three victims. At his trial, the trial court admitted evidence that Keeney had previously committed sexual misconduct with the child of a woman with whom he was then residing earlier in 1989. The Supreme Court upheld the trial court's admission of this evidence on the basis that it was probative of the issue of the defendant's intent in the six counts of sexual assault for which the defendant was being tried a plea of not guilty to, among others, the count of the Amended Information alleging sexual assault.

- b. To Prove the Defendant's Common Scheme or Plan. The Supreme Court of Nevada in Keeney, cited herein above, also held that evidence of prior sexual misconduct by the defendant may be admissible at his trial to show his common scheme or plan or the so-called *modus operandi*. The Court held that there must be sufficient similarities between the instant offenses and the prior uncharged misconduct to "evinced a common scheme or plan." See Keeney, 109 Nev. at 228, 850 P.2d at 316.

2. The Standard of Proof. The Supreme Court of Nevada has held that the State must prove the defendant's prior uncharged misconduct by plain, clear, and convincing evidence. See generally, Petrocelli and Keeney, both cited herein above.

3. The Probative Value of this Evidence Outweighs its Prejudicial Effect. In Keeney, 109 Nev. at 229, 850 P.2d at 316 and 317, the Supreme Court of Nevada has held that evidence of sexual aberration is relevant and its probative value outweighs its prejudicial effect upon the defendant's right to a fair trial. In cases involving sexual aberrations, the Supreme Court of Nevada has adopted "a more liberal judicial attitude...in admitting evidence of prior and subsequent proscribed sexual conduct." See Keeney, 109 Nev. at 229, 850 P.2d at 316 and 317.

Therefore, the State respectfully contends that this Honorable Court should apply the Supreme Court of Nevada's "liberal judicial attitude" and find that the probative value of the evidence of defendant's uncharged misconduct outweighs the prejudicial effect thereof. This Honorable Court would then admit that evidence as requested by the State.

#### IV. CONCLUSION

Based on the discussion herein above, the State respectfully contends that the evidence of the defendant's uncharged misconduct is highly probative of the defendant's intent in the instant case; that this evidence is subject to being proven by plain, clear, and convincing evidence; and the probative value of the said evidence outweighs its prejudicial effect on the defendant. Therefore, the State respectfully requests that this Honorable Court grant this Motion.

**Other Acts Sex Offense II**

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION IN LIMINE PERTAINING TO ADMISSIBILITY OF  
EVIDENCE OF VICTIM'S PRIOR SEXUAL CONDUCT**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK,  
District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and  
hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all  
pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument  
this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

NRS 48.069 provides that:

In any prosecution for sexual assault or for attempt to commit or conspiracy to commit a sexual assault, if the accused desires to present evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent:

1. The accused must first submit to the court a written offer of proof, accompanied by a sworn statement of the specific facts that he expects to prove and pointing out the relevance of the facts to the issue of consent.

2. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the victim regarding the offer of proof.

3. At the conclusion of the hearing, if the court determines that the offered evidence:

(a) Is relevant to the issue of consent; and (b) Is not required to be excluded under NRS 48.035, the court shall make an order stating what evidence may be introduced by the accused and the nature of the questions which he is permitted to ask. The accused may then present evidence or question the victim pursuant to the order.

NRS 50.090 provides that:

In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

A detailed and thoughtful discussion of Nevada's Rape

Shield Law and the rationale behind it is contained in

Lane v. Second Judicial District Court, 104 Nev. 427, 760 P.2d

1245 (1988). In that case, the Supreme Court of Nevada stated:

Nevada's rape shield law recognizes that there may be no relationship between prior sexual conduct and the victim's ability to relate the truth, and that whether a victim has previously consented to sexual activity under different circumstances may have little or no relevance to the issue of her consent to the activities which resulted in the rape prosecution. Moreover, the rape shield law acknowledges that such evidence tends to distract and inflame the jury and carries with it the danger of unduly prejudicing the truth finding process.

See, Lane at 104 Nev. at pages 442 and 443, 760 P.2d at pages

1254 and 1255. The Court went on to say that the purpose of these rape shield laws is to reverse the common law rule that allowed evidence attacking the victim's general reputation for morality and chastity. The Court found that these laws are designed to replace the outdated belief that a victim's reputation for chastity somehow related to her credibility as a witness. Additionally, these laws, the Court found, serve "to protect rape victims from degrading and embarrassing disclosures of intimate details about their private lives." Again see Lane at 104 Nev at page 444, 760 P.2d at page 1256. Finally, the Court quoted Justice Mowbray who explained in Summit v. State, 101 Nev. at page 161, 697 P.2d at page 1375 (1985) that:

...(t)he restrictions placed on the admissibility of certain evidence by the rape-shield laws will, it was hoped, encourage rape victims to come forward and report the crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories.

Pursuant to the statutes cited herein above and Lane v. Second Judicial District Court, cited herein above as well, the State respectfully requests that this Honorable Court enter an Order precluding the defendant from introducing any evidence of any previous sexual conduct of the victim, for any purpose, without first having complied with the provisions of NRS 48.069 requiring the defendant to submit a written offer of proof accompanied by a sworn statement of the specific facts he expects to prove and the relevance of those facts on the issue of the victim's consenting to sexual intercourse on June 2, 1999. Thereafter, if deemed appropriate, this Honorable Court can conduct a hearing outside the presence of the jury to determine what, if any, evidence of the victim's prior sexual conduct is relevant to the specific issue of her consenting to sexual intercourse with the defendant on June 2, 1998.

IV. CONCLUSION

Based on the discussion set out herein above, the State respectfully requests that this Honorable Court issue the Order requested.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_ Deputy District Attorney

**Other Act Evidence**

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK,  
District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and  
hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all  
pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument  
this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

## 1. Standard of Admissibility

The State seeks to present evidence of a prior crime of the defendant in its case-in-chief. The State proffers this evidence pursuant to NRS 48.045(2) which states:

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

The evidence regarding the 1994 conviction is necessary for the purpose of proving the defendant's knowledge of her HIV status, intent to engage in sex for a fee, and knowledge of the nature of the prostitution transaction. When evidence of a prior act is offered to show one of these factors, it is admissible if (1) the prior act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the evidence is more probative than prejudicial. Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347 (1995), Felder v. State, 107 Nev. 237, 240, 810 P.2d 755 (1991); Berner v. State, 104 Nev. 695, 697, 765 P.2d 798 (1983). Further, at a hearing outside the presence of the jury, the Court must make a record of its findings of fact and conclusions of law on the evidence or offer of proof presented. Armstrong v. State, 110 Nev. 1322, 885 P.2d 600 (1994).

## 2. BASIS FOR ADMISSIBILITY

### A. RELEVANCY

**i. Knowledge:** The defendant is charged with engaging in or soliciting prostitution after testing positive for exposure to HIV pursuant to NRS 201.358. That statute requires proof that a defendant has received notice of his or her exposure to HIV. The defendant's 1994 conviction is proof that she knew of her HIV status and admitted to that status.

### ii. Intent:

Nevada Law has specifically affirmed the use of other act evidence to establish the intent of the defendant. Hill v. State, 95 Nev. 327, 594 P.2d 699 (1979); Colley v. State, 98 Nev. 14, 639 P.2d 530 (1982); Findley v. State, 94 Nev. 212, 577 P.2d 867 (1978). "Criminal intent has been defined 'as that state of mind which negatives accident, inadvertence or casualty.'" J. Weinstein & M. Berger, 2 Weinstein's Evidence, section 404[12](1985)(footnotes omitted). Thus, intent means that a person has the purpose to do a thing. Id.

The "intent" exception should be read broadly so as to require any required mental element of the crime, such as knowledge or absence of mistake, accident or duress. Wright & Graham, Federal Practice and Procedure: Evidence, section 5252. The theory upon which evidence of other crimes is admissible on these issues is that its use on the mental element of the offense does not require an inference as to the character of the accused. Id.

As Wigmore explains, the evidence of intent can be offered on a theory of probabilities. We can accept the defense that an accused car thief had a good faith belief that he had permission to take an automobile on one occasion but when the evidence shows that he has made a similar "mistake" before, our doubts grow. It is the improbability of these fortuities rather than any inference as to the character of the accused that supports the belief in guilt.

Id.

Thus, proof that a defendant was aware of the nature of the act at an earlier point in time makes it unlikely that he or she would have forgotten that information at the time of the charged crime.

The above analysis is supported by case law. Evidence of a prior prostitution conviction was held to be a circumstance which would tend to prove purpose or intent in a case involving solicitation for prostitution. In State v. Brown, 633 P.2d 1351 (Wash.App. 1981), the Court of Appeals affirmed the trial court's ruling allowing the use of a prior prostitution conviction for proving purpose or intent in a subsequent prostitution loitering case. 633 P.2d at 1353.

Use of evidence of a prior transaction (bad act) to prove a defendant's knowledge of or intent to engage in a similar transaction is common. For example, it is well settled that in offenses involving the sale or distribution of narcotics that prior offenses are admissible to show intent to sell as well as knowledge of the narcotic character of the item being sold. See, Hill v. State, 95 Nev. 327, 329, 594 P.2d 699 (1979); U.S. v. Trevino, 565 F.2d 1317, 1320 (5th Cir. 1978). See also, Buckner v. State, 95 Nev. 117, 120, 590 P.2d 628 (1979)(admissible for establishing knowledge and intent in establishing charge of obtaining money by false pretenses); State v. McKinney, 786 S.W.2d 178 (Mo.App. 1989)(in prosecution for promoting pornography, evidence of defendant's prior arrest record for the same offense was admissible to prove knowledge of the content of pornography materials at issue in case at bar).

## **B. CLEAR AND CONVINCING EVIDENCE**

Before evidence of prior bad acts may be admitted, there must be clear and convincing evidence that such acts actually occurred. See, Winiarz v. State, 107 Nev. 812, 820 P.2d 1317 (1991)(must show that prior event actually occurred); Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985)(evidence of prior act was clear and convincing where defendant admitted to it and there were eye

**Other Act Evidence II**

CODE  
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

NRS 48.052(2) provides:

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

The use of the words "such as" makes clear that the just-quoted list of theories is illustrative only, and not exhaustive. The case law is in accord. *See United States v. Diggs*, 649 F.2d 731, 737 (9th Cir. 1981); *United States v. Sangrey*, 586 F.2d 1312, 1314 (9th Cir. 1978); *United States v. McDonald*, 576 F.2d 1350, 1356 (9th Cir. 1978); *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982); *United States v. Johnson*, 634 F.2d 735, 737 (4th Cir. 1980); *United States v. Guerrero*, 650 F.2d 728, 733 (5th Cir. 1981); *United States v. Tisdale*, 647 F.2d 91, 93 (10th Cir. 1981); *United States v. Dauther*, 666 F.2d 498, 501 (11th Cir. 1982); *United States v. Foskey*, 636 F.2d 517, 523-524 (D.C. Cir. 1980).

#### **A. INTENT**

It is well settled that other acts evidence may be used to prove intent. *Hill v. State*, 95 Nev. 327 (1979); *Colley v. State*, 98 Nev. 14 (1982); *McMichael v. State*, 94 Nev. 184 (1978); *Findle v. State*, 94 Nev. 212 (1978); *See also* NRS 48.045(2), quoted *supra*.

The aforementioned evidence clearly goes to the defendant's intent to injure or kill the victim.

#### **B. MALICE**

Malice aforethought is one of the elements the State must prove in order to sustain the charge of murder. Other acts evidence is admissible to prove malice. *United States v. Lewis*, 837 F.2d 415 (9th Cir. 1988); *State v. Leonardo*, 715 F.Supp 1170 (Eastern District of New York 1989); *State v. Overkamp*, 645 S.W.2d 733 (Mo. 1983).

The aforementioned evidence clearly goes to the issue of malice aforethought.

#### **C. DELIBERATION AND PREMEDITATION**

Other acts evidence is admissible to prove premeditation and deliberation in a murder case. *State v. Sadowski*, 247 Mont. 63, 805 P.2d 537 (1991), affirmed without opinion, 2 F.3d 1157 (9th Cir. 1993). *See also* *Edward M. Imwinkler* *reid* "Uncharged Misconduct Evidence," 1992 Ed., § 5:16.

#### **D. ABSENCE OF MISTAKE OR ACCIDENT**

It is well settled that the State may use other acts evidence in order to negate or rebut a claim of accident or mistake. In Petrocelli v. State, 101 Nev. 46 (1985), the Nevada Supreme Court upheld the admission of evidence under NRS 48.045 on this basis. The decisions of other jurisdictions are in accord. *See, e.g., State v. Yager*, 461 N.W.2d 741, 745 (Neb. 1990); United States v. Naranjo, 710 F.2d 1465 (10th Cir. 1983); United States v. Shaw, 701 F.2d 367 (5th Cir. 1983); United States v. Hillsberg, 812 F.2d 328, 334 (7th Cir. 1987); United States v. Leight, 818 F.2d 1297 (7th Cir. 1987).

### CONCLUSION

Other acts evidence is admissible where: 1) the evidence is relevant to prove any of the laundry list of theories listed in NRS 48.045(2), or for any other non-character use; 2) the State shows that the defendant committed the other act by clear and convincing evidence; and 3) the probative value of the other acts evidence is not outweighed by the danger of unfair prejudice. Petrocelli v. State, 101 Nev. 46 (1985).

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

### **Other Act Evidence III**

#### CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By

\_\_\_\_\_

(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

As in the preliminary hearing, plaintiff proffers this evidence pursuant to NRS 48.045(2) which states:

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

The evidence regarding the 1991 fire is necessary to the State for purposes of proving the defendants' knowledge, plan, intent, the absence of accident, as well as the identity of the defendants. When the evidence of a prior act is offered to show one or more factors listed in

NRS 48.045(2), it is admissible if (1) the prior act is relevant to the crime charged; (2) the prior act is proven by clear and convincing evidence; and (3) the evidence is more probative than prejudicial. Felder v. State, 107 Nev. 237, 240, 810 P.2d 755 (1991); Berner v. State, 104 Nev. 695, 765 P.2d 1144 (1988).

(1) Relevancy: The defendants are charged with Third Degree Arson (NRS 205.020), Negligent Destruction of Property by Fire (NRS 475.040 and 193.155), and Conspiracy to Possess and/or Use Fireworks (NRS 199.480, WCC 60.030 and UFC 78.102(b)). NRS 205.020 requires proof of maliciousness as an element of Third Degree Arson. It is defined in NRS 193.0175 as “...an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.”

The element of gross negligence required in NRS 475.040 (Count II) is defined in CALJIC 3.36 as “...a negligent act which is aggravated, reckless, and gross and which is such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for danger to human life or to constitute indifference to the consequences of such acts. The facts must be such that the consequences of the negligent act could reasonably have been foreseen and it must appear that the danger to human life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or grossly negligent act.”

The test for relevancy is found in NRS 48.015 and defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.”

The instant case presents a unique factual scenario in which the defendants may not have specifically intended to cause the resulting destruction to Peavine Mountain. The State certainly does not contend it possesses such proof. Although the charges do not require proof of specific intent the State must prove maliciousness (more than the general intent to do an act) and gross negligence. These elements clearly require knowledge of the dangerousness of an act and lack of accident.

With respect to maliciousness, the Iowa Supreme Court upheld the finding of malice in Iowa v. Dunn, 199 N.W.2nd 104 (1972), stating at p.108 , “...the intentional doing of a ‘wrongful act,’ without justification or lawful excuse, will permit an inference of a wicked state of mind, i.e., legal malice, as opposed to actual malice.” (Citations omitted).

Since maliciousness requires proof of a state of mind, there rarely exists direct evidence or proof. As is common in crimes requiring knowledge or malice, the only avenue available to the plaintiff is to prove an inference pursuant to NRS

193.0175. Gross negligence includes elements of foreseeability and aggravated negligence. The 1991 incident clearly revealed the defendants’ foreseeability of danger, recklessness, and malice. The relevance of the bad act evidence is therefore without question.

(2) Clear and Convincing Evidence: Plaintiff will present not only the witness who testified at the preliminary hearing (Marcie Fredricks) but also the other two individuals who accompanied the defendants up to Peavine Mountain in 1991. All three have related consistent statements regarding the fireworks and resulting fire which was extinguished. The State requests an opportunity to present this evidence as an offer of proof to the satisfaction of the Court.

(3) Probative Value: Although malice and knowledge do not require a showing of specific intent, they both connote more than simple general intent and require proof of a specific state of mind. Plaintiff submits that there is really no other effective means of offering proof of maliciousness and gross negligence in this case. The recklessness of defendants' act and foreseeability of danger can be proved by evidence of defendants' actual knowledge from a prior similar incident which resulted in a fire in the same general area of Peavine Mountain. Without this evidence, the jury is left predominantly with pure speculation as to what the defendants knew or must have considered — essential elements of malice and gross negligence.

It is well settled that in a narcotic offense, knowledge of the narcotic nature of the involved substance may be proved with other similar offenses. Hill v. State, 95 Nev. 327, 329, 594 P.2d 699 (1979); Mayer v. State, 86 Nev. 466, 468, 470 P.2d 420 (1970). See also Buckner v. State, 95 Nev. 117, 120, 590 P.2d 628 (1979) (admissible for establishing knowledge and intent in charge of Obtaining Money by False Pretenses); Dutton v. State, 94 Nev. 461, 464, 581 P.2d 856 (1978) (for proving knowledge of stolen character of goods for Possession of Stolen Property).

The prior act evidence also provides proof of the defendants' intent and plan regarding Count III (Conspiracy). Courts have consistently permitted such evidence when necessary to prove specific intent or state of mind. See Colley v. State, 98 Nev. 14, 17, 639 P.2d 530 (1982); U.S. v. Liefer, 778 F.2d 1236 (7th Cir. 1985).

In U.S. v. Liefer, *supra*, the defendant was charged with Conspiracy to Distribute Marijuana. The Seventh Circuit Court of Appeals affirmed the lower Court's admission of defendant's prior marijuana sale to prove knowledge and intent stating at p.1244, "the testimony was probative of Liefer's specific intent to distribute, which was an essential element of the crime for which Liefer was charged." When intent is a material

element to be proved and more than a mere formal issue inferred from the act itself, the government may submit evidence of other acts in an attempt to establish the matter in its case—in—chief. “Intent is never a ‘formal issue’ when the defendant is charged with a specific intent crime.” Id. at p.1242.

The evidence of defendants’ prior act is essential to the State’s theory of proof surrounding essential elements of the charged offenses. The probative value of this evidence based upon its relevancy and necessity is therefore not “substantially outweighed by the danger of unfair prejudice.”

NRS 48.135.

(4) Case—in—chief: Many cases support the proposition that prior acts evidence should, whenever possible, be presented in the State’s case—in—chief. U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 531 (4th Cir. Ct. of App. (1985) (knowledge of bid rigging). This is especially required when the evidence is offered in support of material elements of the charges rather than merely to rebut a defense. Carison v. State, 84 Nev. 534, 537, 445 P.2d 157 (1988). See also Petrocelli v. State, 101 Nev. 46, 51, 692 P.2d 502 (1985); Colley v. State, *supra*.

**Other Act Evidence IV**

CODE

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## POINTS AND AUTHORITIES

### I. STATEMENT OF THE CASE

### II. STATEMENT OF THE FACTS

### III. ARGUMENT

#### EVIDENCE OF PRIOR BAD ACTS IS

#### ADMISSIBLE PURSUANT TO NRS 48.045

NRS 48.045 is entitled Evidence of Character inadmissible to prove conduct; exceptions; other crimes.

1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;

(b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence; and

(c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support his credibility, within the limits provided by NRS 50.085.

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

(Emphasis ours).

The use of the words "such as" makes it clear that the just quoted list of theories of relevance is a non-exhaustive one. The Court has established the following three prerequisites to the introduction of other bad acts:

(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. NRS 48.035; *Walker v. State*, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996), *Nester v. State*, 75 Nev. 41 (1959) *Berner v. State*, 104 Nev. 695, (1988) (Also, for sexual aberration, *Bolin v. State*, 114 Nev. 503, 960 P.2d 784, (1998).

The general rule is that prior or subsequent misconduct is admissible only if it is relevant for some purpose other than to show the accused probably committed the crime because he is of a bad or criminal character. *Thierault v. State*, 92 Nev. 185; *Tucker v. State*, 82 Nev. 127, (1966). The rule prohibits the use of bad act evidence to establish a person's bad character. But the rule permits the use of bad act evidence when that evidence has special relevance to a fact in issue.

**THE STATE WILL PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT COMMITTED THE BAD ACT:**

**THE CLEAR AND CONVINCING EVIDENCE STANDARD**

The prosecution is prepared to meet the clear and convincing evidence standard of proof at a hearing to be held outside the presence of the jury if the Court makes a prima facie finding of admissibility.

confirms that this too was a domestic violence incident.

**THE STATE WILL ESTABLISH THE SPECIAL RELEVANCE OF THE BAD ACT TO A MATERIAL**

**FACT IN ISSUE RELEVANCE**

NRS 48.015 defines relevance as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

The independent, legitimate and special relevance of this evidence to the State's case is that through this evidence, the State wishes to show the defendant's intent, identity, motive, absence of mistake or accident, and his common plan and scheme.

When specific intent is an element of the offense, intent is never merely a formal issue but is always a matter in issue for prior bad acts purposes. *U.S. v. Leifer*, 778 F.2d 1236, 1242 (7th Cir. 1985). her for him so he doesn't get his hands dirty.

**PROBATIVE VALUE**

It is well settled that other acts evidence may be used to prove intent. *Hill v. State*, 95 Nev. 327 (1979). The intent or state of mind of the accused is often the most difficult element of a crime to prove. *State v. Sadowski*, 805 P.2d 537, 542 (Mont. 1991).

When the crime charged requires proof of specific intent, we have held that, because it is a material element to be proved by the government, it is necessarily an issue and the government may submit evidence of other acts in an attempt to establish the matter in its case-in-chief... *U.S. v. Shackelford*, 738 F.2d 776 (7th Cir. 1984).

In *U.S. v. Weidman*, 572 F.2d 1199, 1202 (7th Cir. 1978), the Court upheld the introduction of prior acts evidence concerning intent even though the defendant had not disputed the issue by claiming that he acted innocently or mistakenly, since the mail fraud charges included the specific intent to defraud.

Nevada law is in complete accord and permits bad act evidence in case-in-chief when it is substantially relevant to proving an element of the charged offense. See *Findley v. State*, 94 Nev. 212 (1978); *Carlson v. State*, 84 Nev. 534, 537 (1988); *Colley v. State*, 98 Nev. 14 (1982).

Following a strong trend toward blanket admissibility, the statutes of many states as well as the Federal Rules of Evidence now provide for the admissibility of other acts of sexual aberration. Nevada has yet to codify this view even though it is firmly established in Nevada case law that evidence of a specific emotional propensity for sexual aberration is certainly relevant and highly probative. *Findley v. State*, 94 Nev. 212, 215 (1978).  
to understand how Ms. Soto-Cordon was controlled over the years.

#### COMMON PLAN OR SCHEME/IDENTITY

Bad act evidence also has special relevance when used to establish a common plan or scheme. The State is prepared to show shared characteristics between the bad act and the charged offense. *State v. Daly*, 99 Nev. 564, 566-7. Review of the evidence reveals that the similarities between the crimes are planned rather than the product of chance.

Case law provides ample authority for admission of the facts and circumstances surrounding the prior bad acts in the state's case-in-chief, whenever possible. This is especially true when the evidence is offered in support of material elements of the charge rather than merely to rebut a defense. *Carlson v. State*, 84 Nev. 534, 537, (1988); *Petrocelli v. State*, 101 Nev. 46, 51

Plaintiff hereby requests the use of such evidence during case-in-chief.

#### THE LAW MAKES NO DISTINCTION BETWEEN PRIOR AND SUBSEQUENT ACTS

Lastly, although some of the collateral offenses in this matter may have occurred subsequent to the charged acts, NRS 48.045 and case law make no distinction between the use of prior versus subsequent conduct in

this area. *Brinkley v. State*, 101 Nev. 676 (1985). Furthermore, remoteness in time may affect the credibility of the witness, but not the admissibility of the evidence. *Findley v. State*, 94 Nev. 212 (1978) (nine years between prior act and instant offense), *State v. Sadowski*, 805 P.2d 537 (Mont. 1991).

#### V. REBUTTAL EVIDENCE

If this Honorable Court denies the use of such evidence in case-in-chief, the State requests the opportunity to use such evidence in rebuttal if the defendant assumes the stand and makes any claim negating intent or identity, or claiming any absence of mistake or any accident. If the defendant claims his conduct was just "misinterpreted", the State urges that the jury be permitted to receive pertinent evidence reflecting defendant's motives.

At that juncture, the defendant will have specifically and affirmatively contested a material issue, clearly enhancing the probative value of such evidence for the State. *U.S. v. Weddell*, 890 F.2d 106 (8th Cir. 1989; *State v. Renon*, 828 P.2d 1266 (HI. 1992); *Wallin v. State*, 93 Nev. 10 (1977) (defendant claimed epileptic seizure in battery prosecution).

Where defendant testifies to controvert an element of the government's case, such as intent, to which the extrinsic evidence is highly relevant, the integrity of the judicial process commands that the defendant be faced with that evidence. *U.S. v. Beechum*, 582 F.2d 989, 909 (5th Cir. 1978).

In *Williams v. State*, 95 Nev. 830 (1979), the defendant claimed consent involving a charge of Sexual Assault and the Supreme Court upheld the use of bad acts evidence stating at pg. 833:

By acknowledging the commission of the act but asserting his innocent intent by claiming consent as a defense, Williams placed in issue a necessary element of the offense and it was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut William's testimony on a point material to the establishment of his guilt.

#### **NO LEGAL EXCLUSIONS TO THE BAD ACT EVIDENCE APPLY**

The State submits that it has satisfied its burden of proving defendant committed the prior bad acts, and its special relevance to charged crimes.

**Other Act Evidence V**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

#### **THE EVIDENCE OF THE DEFENDANT'S OTHER CRIMES, WRONGS, OR ACTS IS ADMISSIBLE TO SHOW THE DEFENDANT'S INTENT, PREPARATION, PLAN, KNOWLEDGE AND/OR MODUS OPERANDI.**

Nevada law expressly permits the use of other crimes, wrongs, or acts for relevancy purposes

other than showing a person is of bad character or conformity therewith. Specifically, NRS 48.045(2) states:

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

Subsequent case law has further defined the protocol for which the Court can allow the use of such evidence. Specifically, the Nevada Supreme Court has ruled that the district court must conduct a hearing to determine whether evidence of other acts is admissible. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *citing* Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996).

At the hearing, to be held outside the presence of the jury, the district court must determine whether "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Id.; *see also* NRS 48.035.

It is also well settled that the State may use the defendant's charged or uncharged misconduct to prove the use of a distinct modus operandi by the accused. Williams v. State 95 Nev. 830 (1979); *see also* United States v. Baldarrama, 566 F.2d 560 (5th Cir. 1978); People v. Hasten, 69 Cal.2d 233, 70 Cal. Rptr. 419, 444 P.2d 91 (1968) and People v. Rodriguez 68 Cal.App.3d 874, 137 Cal.Rptr. 594 (1977). The key factors for this Court to determine whether or not there is sufficient similarity between the charged and uncharged crimes to allow evidence of modus operandi include: (1) the time lapse between the two crimes and (2) the geographic distance between the crimes. United States v. Farber, 630 F.2d 569 (8th. Cir. 1980);

Walker v. State, 588 S.W.2d 920, 924 (Tex.App. 1982); Messenger v. State, 638 S.W. 2d 883 (Tex.App. 1982).

Finally, courts have consistently found the probative value of the proffered evidence to be great when its admission is justified by necessity in proving the elements of the charge. Jones v. State, 85 Nev. 4, 448, P.2d 702, (1969). Similarly, when not entirely necessary for the State's proof (i.e. motive), the Court may still admit the testimony if it is otherwise highly probative. *See* Sults v. State, 96 Nev. 742, 749, 616 P.2d 388 (1980); *see also* Williams v. State, 95 Nev. 830, 833, 603 P.2d 695 (1979).

### **CONCLUSION**

The State respectfully submits the aforementioned evidence relating to the defendant's alleged other trafficking charges as proof therein of intent, preparation, plan, identity and knowledge. Following a Petrocelli hearing in this matter, the State will respectfully request this Honorable Court to permit it to introduce the defendant's other acts evidence in its case-in-chief.

**Other Act Evidence Admissibility at Sentencing**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

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Dept. No.

Defendant.

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**MOTION TITLE**

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District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and  
hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all  
pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument  
this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

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### III. ARGUMENT

Williams is the seminal case dealing with the broad amount of information a trial court is entitled to consider in imposing a sentence. It has been cited with approval in dozens of subsequent United States Supreme Court decisions as well as in literally hundreds of other decisions from other federal and state appellate courts. See, e.g., Williams v. Oklahoma, 358 U.S. 576, 584 (1959); Gregg v. Georgia, 428 U.S. 153, 189 (1976); United States v. Grayson, 438 U.S. 45, 48—49 (1978); United States v. Plisek, 657 F.2d 920, 927 (7th Cir. 1986); 101 United States v. Wise, 603, F.2d 1101, 1105 (4th Cir. 1979); Eyman v. Alford, 448 F.2d 306 314, 315 (9th Cir. 1969); Arizona v. Cawley, 648 P.2d 142, 144 (Arizona 1982).

In Williams, the United States Supreme Court gave an extended discussion regarding the broad discretion trial judges have in considering information that would not be admissible at trial on the merits.

Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But before and since the American colonies became a nation, courts in this country and in England practiced a policy in which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out—of—court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and background of convicted offenders. A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of

Criminal Procedure. That rule provides for consideration by Federal Judges of reports made by probation officers containing information about a convicted defendant, including such information ‘as may be helpful in imposing a sentence or in granting probation or in the correctional treatment of the defendant...’

In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures there are sound practical reasons for the distinction. In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular events charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant — — if not essential — — to [the trial judges] selection of an appropriate sentence is possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. Williams, 337 U.S., at pp. 246—247.

In United States v. Plisek, 657 F.2d 920 (1981), the

Seventh Circuit relied heavily on Williams in approving a trial court judges consideration of the facts and circumstances relating to a prior case in which the subject defendant had been acquitted following trial. Id., at page 927. In Plisek the court stated:

[T]he scope of a sentencing judge's discretion is wide, and in making the sentencing determination, 'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' United States v Tucker, 912 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). While it has been suggested that consideration of mere arrests or pending charges be prohibited in reaching the sentencing determination, United States v. Johnson, 507 F.2d 826, 832 (7th Cir. 1974), cert denied, 421 U.S. 949, 95 S.Ct. 682, 44 L.Ed.2d 103 (1975) (concurring and dissenting opinion) (Swygert, CJ.), the legislature has chosen to permit a far broader inquiry into 'the background, character and conduct' of a convicted defendant. 18 U.S.C. S3577 (1976). A broad interpretation of this language finds support in the legislative history of §3577, which makes it clear that the section was intended to 'maximize sources of sentencing information [and] to guard against the unnecessary formalization of sentencing procedures.' Rep. No. 91—617, 91st Cong., 1st Sess 90 (1969), quoted in United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977). This legislative mandate reflects a sentencing philosophy articulated by the Supreme Court in Williams v. New York. Plisek, Id., at p.927.

The Plisek court then went on to quote from the Williams decision before concluding that:

[The] Williams court intended that full knowledge of the defendant's entire background should be available to the sentencing court.

- we believe that under this broad grant of sentencing discretion the trial court did not err in referring to information in the presentence report concerning the circumstances surrounding a prior acquittal,

particularly in view of the wide latitude of response to the information permitted to the defendant. Plisek, Id, at p.927.

In the case at bar, the State is not seeking to introduce factual evidence regarding prior events for which the defendant has been acquitted. The State is merely seeking to introduce evidence of prior uncharged misconduct by the defendant. More importantly, in Plisek the trial judge considered facts related to the acquitted charge which were hearsay contained in a pre—sentence report. Plisek, p. 927. In the case at bar, if the court grants the State’s request the State will present the source of most of the uncharged misconduct information — - — Kimberly Burroughs — - - live on the stand and allow her to be cross—examined by the defense. The only information that will be presented by Ms. Burroughs that is not of her first—hand knowledge is the information that the defendant had bragged to her about vaginally raping a young girl with a rifle barrel. However, this information is more reliable than most types of hearsay because it is from the defendant’s own mouth. It is highly unlikely that a person would make up a story about inserting a rifle barrel into the vagina of a girl unless he and/or his accomplices had actually ~ committed the act.

In Arizona v. Cawley, 648 P.2d 142 (Arizona 1982), the defendant was convicted in the court below of three counts Of child molesting. On appeal, he challenged the trial judge’s consideration of hearsay information regarding past evidence of peculiar sexual behavior. This hearsay information was in the form of a pre—sentence report and a report from his United States Navy record. The appellate court upheld the trial court’s consideration of this hearsay evidence regarding the defendant’s abnormal sexual behavior, even though none of the prior incidents resulted in convictions. Cawley, id, at p.144. Again, in the case at bar the State will not be seeking to introduce hearsay information regarding misconduct for which the defendant has not been convicted. Instead, the State will place a live witness on the stand who has first—hand knowledge of the events she will be testifying to.

In Smith v. State, 517 A.2d 1081 (MD. 1986), the Maryland Court of Appeals held that testimony concerning a rape defendants alleged participation in an uncharged, unrelated attempted rape of another woman was properly admitted at the sentencing hearing, even though no charges had ever been filed in the attempted rape case. The defendant argued

that the testimony was unreliable because no formal charges had been filed. The Court rejected this claim and noted that the victim's testimony was not to be deemed incredible simply because she had not pressed charges. The Court noted she was...sworn to tell the truth at the sentencing hearing and was subject to cross examination. Smith, Id, at pp. 1083—1088. Smith is squarely on point to the issue presented to this Court and a copy of the opinion is attached hereto for the Court's consideration.

NRS 175.552 deals with the evidence that may be considered at the penalty/sentencing hearing in first degree murder cases. That section provides:

In the hearing, evidence may be presented concerning aggravated and mitigating circumstances relative to the events, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible. NRS 175.552(3). This section makes clear that the Nevada Legislature intended that the sentencing body in first degree murder cases be allowed to consider the broadest amount of information possible.

The Nevada Legislature has also made clear that a broad amount of information may be considered by the sentencing court in cases other than first degree murder. NRS 176.145(l)(a)(b) provides that the pre—sentence report compiled to assist the judge at sentencing must contain information regarding the prior criminal record of the defendant and “such information about his characteristics, his financial condition, the circumstances effecting his behavior and the circumstances of the offense, as may be helpful in imposing sentence.

## **CONCLUSION**

**Other Act Evidence Bribing or Dissuading Witness**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
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THE STATE OF NEVADA,

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Case No. CR

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DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

His actions in this regard constitute a felony violation of NRS 199.240, Bribing or intimidating witness to influence testimony.

In either event, the proffered evidence clearly constitutes evidence of another crime, wrong, or act which is subject to exclusion under the provisions of NRS 48.045(2) states:

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

The State respectfully contends that the purpose for admitting the proffered evidence is not to prove the defendant's character. Rather, the State seeks to admit these letters as evidence tending to show the defendant's consciousness of guilt in this case. The Supreme Court of Nevada in Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979), held that "the conduct of an accused which shows consciousness of guilt is admissible, even though it may in itself be criminal." The Court went on to say, "An attempt to bribe a witness or otherwise procure or fabricate false testimony is clearly within this category." Reese, supra. 95 Nev. at 423, 596 P.2d at 215. See also, Abram v. State, 95 Nev. 352, 594 P.2d 1143 (1979).

Therefore, it is clear that attempts to bribe a witness or to dissuade a witness from testifying at all as the defendant has done in the instant case is clearly admissible as it is highly probative evidence of the defendant's consciousness of guilt.

Such evidence must be capable of proof by plain, clear, and convincing evidence. See generally, Petrocelli, supra. and Armstrong, supra.

The prejudice, if any, to the defendant can be corrected with the following jury instruction:

If you find that the defendant attempted to suppress evidence against himself in any manner, such as by attempting to dissuade a witness to testify against him, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

This instruction is CALJIC 2.06. Therefore, the State respectfully contends that the highly probative value of the proffered evidence clearly outweighs any prejudice to the defendant's right to a fair trial.

**IV. CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Other Act Evidence Specific Intent Lack of Mistake**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

**Evidence of Prior Bad Acts Is Admissible To Establish And Prove Intent, And Absence Of Accident Or Mistake.**

NRS 48.015 provides that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.025 excludes the admission of evidence that is not relevant.

NRS 48.035 provides as follows:

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

NRS 48.045(2) provides as follows:

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

By entering a plea of not guilty to the crimes alleged in the Information, TIETJEN placed her intent at issue in this case. McMichael v. State, 94 Nev. 184, 188 (1978). It is well settled that other acts evidence may be used to prove intent. See Hill v. State, 95 Nev. 327 (1979); Colley v. State, 98 Nev. 14 (1982); McMichael, supra, 94 Nev. 184; Findley v. State, 94 Nev. 212 (1978).

[N]o reference shall be made to such collateral offenses unless, during the state's case-in-chief, such evidence is relevant to prove motive, intent, identity, the absence of mistake or accident, or a common scheme or plan; and then, only if such evidence is established by plain, clear, and convincing evidence. Petrocelli, supra, 101 Nev. 46 (citing Carlson v. State, 84 Nev. 534, 537 (1968)).

In Margetts v. State, 107 Nev. 616 (1991), Margetts was a coin dealer who bought 100 gold "krugerrands" on credit from another dealer at a coin show. Margetts was supposed to pay the other dealer for the coins at the end

of the week long show. During the week, Margetts sold the coins and lost all the proceeds in casino gambling. Margetts gave the other dealer a bad check; hence, failing to repay the debt.

Margetts was charged with obtaining money under false pretenses and swindling. At trial, Margetts testified that he had no intention of swindling the other dealer, and that he tendered the bad check by mistake.

The Supreme Court upheld the decision of the District Court wherein the State was permitted to present prior bad act evidence that Margetts had swindled the other dealer in the past to establish intent and absence of mistake. The Supreme Court held that Margetts placed his intent at issue, making prior bad act evidence admissible to prove intent, or absence of mistake. See also Brinkley v. State, 101 Nev. 676 (1985).<sup>5</sup>

In Margetts, 107 Nev. 616, Margetts had previously swindled the same dealer who he then swindled some time later. In this case, TIETJEN previously passed a forged/altered check to the Plantation, and has now passed checks at the Rail City Casino without having sufficient funds in her account. Thus, the facts in Margetts, 107 Nev. 616, and this case are starkly similar.

#### **CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

---

<sup>5</sup> In Brinkley, 101 Nev. 676, the Supreme Court upheld the admission of prior bad act evidence wherein Brinkley was convicted of unlawfully obtaining a controlled substance or prescription, and of conspiracy to obtain a controlled substance or prescription. At trial, Brinkley claimed that the failure to disclose to each practitioner that he was receiving controlled substances from other practitioners was the result of an innocent mistake. The Supreme Court upheld the admission of prior bad act evidence showing that Drummond, subsequent to the occurrence of the substantive crimes, attempted to obtain a controlled substance by utilizing a forged prescription, while Brinkley waited outside in the car. The Supreme Court held that "[t]he forged prescriptions also tended to prove that Brinkley and Drummond planned and schemed to obtain numerous prescriptions for controlled substances; and the evidence logically tended to show a common plan or scheme.

Deputy District Attorney

**Other Act Evidence Subsequent**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

For the charge of Murder the State must prove malice aforethought on the part of the defendant. Plaintiff must further prove intent to kill, premeditation and deliberation in order to establish First Degree Murder. See NRS 200.030. In addition, the State has the burden of disproving self-defense beyond a reasonable doubt. Barone v. State, 109 Nev. 778 (1993).

The general rule is that prior or subsequent misconduct is admissible only if it is relevant for some purpose other than to show the accused probably committed the crime because he is of a criminal character. Thierault v. State, 92 Nev. 185 (1976).

NRS 48.045 provides for the admissibility of such evidence for “other purposes” such as to prove intent, motive or lack of accident or mistake if (1) the act is relevant to the crime charged; (2) the act is proven by clear and convincing

evidence; and (3) the evidence is more probative than prejudicial. Felder v. State, 107 Nev. 237, 240 (1991)

### Relevance

NRS 48.015 defines relevance as:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

In State v. Wood, 638 P.2d 908 (Kans. 1982), and State v. Huynh, 742 P.2d 160 (Wash. App. 1987), the courts recognized the relevance of collateral violent conduct to prove premeditation, motive or intent in prosecutions for murder. The use of such collateral misconduct is especially relevant in proving the lack of reasonableness of self-defense, i.e., whether a person acted with criminal intent or in self-defense. See State v. Sadowski, 805 P.2d 537, 543 (Mont. 1991)

Intent refers to the state of mind with which an act is done. State v. Renon, 828 P.2d 1266, 1272 (Hi. 1992), citing “Black’s Law Dictionary” p. 810 (6th Ed. 1990). When specific intent is a necessary element of the crime by statute, it is directly placed in issue by the not guilty plea of the accused. U.S. v. Shackelford, 738 F.2d 776 (7th Cir. 1984); Findley v. State, 94 Nev. 212 (1978)

Because the instant offense and subsequent attacks on Ms. Hall and Crystal Woolf-Innis involved evidence surrounding malice and the intention to kill on separate occasions, the evidence of either attack is admissible toward proving Juarez’s

state of mind in the instant offense. In Colley v. State, 98 Nev. 14 (1982), the defendant was charged with Attempted Murder and Battery With Intent To Commit Sexual Assault as a result of a stabbing incident. The Supreme Court held that evidence of a completely unrelated attack on another girl in which the defendant choked and raped her, “was relevant in proving Colley’s state of mind,” because the Battery charge required proof of specific intent to assault the victim sexually.

When specific intent is an element of an offense, intent is never merely a formal issue but is always a matter in issue for prior bad acts purposes. U.S. v. Leifer, 778 F.2d 1236, 1242 (7th Cir. 1985)

#### Clear And Convincing Evidence

Following a preliminary hearing, defendant was bound over to the Second Judicial District Court to face charges of Attempted Murder and Battery Causing Substantial Bodily Harm with regard to the incident involving Juarez’s attorney. As to his attack on his girlfriend, Crystal Woolf-Innis, the State has chosen not to charge that offense at this time based upon her request. However, plaintiff is prepared to meet the clear and convincing evidence standard of proof at a hearing to be held in this matter on both subsequent bad acts if this Court makes a prima facie finding of admissibility.

### Probative Value

The intent or state of mind of the accused is often the most difficult element of a crime to prove. State v. Sadowski, *supra*, at 542. “When the crime charged requires proof of specific intent, we have held that, because it is a material element to be proved by the government, it is necessarily an issue and the government may submit evidence of other acts in an attempt to establish the matter in its case-in-chief. . . “ U.S. v. Shackelford, *supra*, at 781.

In U.S. v. Weidman, 572 F.2d 1199, 1202 (7th Cir. 1978), the Court upheld the introduction of prior acts evidence concerning intent even though the defendant had not disputed the issue by claiming he acted innocently or mistakenly, since the mail fraud charges included the specific intent to defraud.

Nevada law is in complete accord and permits bad act evidence in case-in-chief when it is substantially relevant to proving an element of the charged offense. See Findley v. State, *supra*; Carison v. State, 84 Nev. 534, 537 (1988) ; Colley v. State, *supra*.

In Powell v. State, *supra*, the Court approved the use of a subsequent bad act in the State’s case-in-chief. Powell was charged with Murder and prior to trial telephoned the victim’s sister and threatened to kill her. The defense opposed the introduction of the evidence regarding the threat because it constituted proof of another crime. The Court held, “The testimony was admissible under NRS 48.045 as proof of intent to cill Melea.” Melea was, of course, the murder victim.

Courts have consistently determined the probative value )f such evidence to be great when its admission is justified by necessity in proving the elements of the charge. ~ Jones v. State, 85 Nev. 4 (1969); U.S. v. Leifer, *supra*.

Although case law provides ample authority for admission in the State’s case-in-chief of the facts and circumstances surrounding defendant’s attack and intent to kill Ms. Hall, as well.as his attack on Crystal Woolf-Innis, plaintiff hereby requests the use of such evidence only

after defendant may claim justifiable or lawful killing. At that time, defendant will have specifically and affirmatively contested a material issue, clearly enhancing the probative value of such evidence for the State. ~ U.S. v. Weddell, 890 F.2d 106 (8th Cir. 1989); State v. Renon, supra; Wallin v. State, 93 Nev. 10 (1977) (defendant claimed epileptic seizure in Battery prosecution).

Where the defendant testifies to controvert an element of the government's case, such as intent, to which the extrinsic evidence is highly relevant, the integrity of the judicial process commands that the defendant be faced with that evidence. U.S. v. Beechum, 582 F.2d 898, 909 (5th Cir. 1978)

In Williams v. State, 95 Nev. 830 (1979), the defendant claimed consent involving a charge of Sexual Assault and the Supreme Court upheld the use of bad acts evidence stating at p. 833:

By acknowledging the commission of the act but asserting his innocent intent by claiming consent as a defense, Williams placed in issue a necessary element of the offense and it was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut Williams' testimony on a point material to the establishment of his guilt.

#### Prior Versus Subsequent Acts

Lastly, although the collateral offense in this matter occurred subsequent to the murder, NRS 48.045 and case law make no distinction between the use of prior versus subsequent conduct in this area. see Powell v. State, supra; Brinkley v. State, 101 Nev. 676 (1985). Furthermore, remoteness in time may affect the credibility of the evidence but not its admissibility. Findley v. State, supra, (nine years between prior bad act and instant offense); State v. Sadowski, supra, at 541-542.

**Other Act Evidence Res Gestae Rule**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

MOTION OF THE INTRODUCTION OF EVIDENCE  
OF CERTAIN OTHER CRIMES, WRONGS, OR ACTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this Motion for the Introduction of Evidence of Certain other Crimes, Acts, or Wrongs committed by the defendant named herein above. This Motion is supported by all papers and pleadings on file herein, the attached Points and Authorities, the hearing conducted in accordance with Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) and Armstrong v. State, 110 Nev. 1322, 885 P.2d 600 (1994), and any oral argument this Honorable Court may entertain on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **III. ARGUMENT**

#### **A. The *Res Gestae* Doctrine.**

NRS 48.035(3) provides:

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

This statute sets out the *res gestae* exception to the prohibition against introducing other crimes or acts against the defendant. The Supreme Court of Nevada recognized this exception in Allan v. State, 92 Nev. 318, 549 P.2d 1402

(1976) and held that:

...when several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction, and when full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme.

See Allan, supra. at 92 Nev. at 321, 549 P.2d at 1404. Further, the Court has held in State v. Shade, 111 Nev. 887, 900 P.2d 327 (1995) that:

In reading NRS 48.035 as a whole, it is clear that where the *res gestae* doctrine is applicable, the determinative analysis is not weighing of the prejudicial effect of the evidence of other bad acts against the probative value of that evidence. If the doctrine of *res gestae* is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

See Shade, supra. at 900 P.2d at 331. In Sutton v. State, 114 Nev. 1327, 972 P.2d 334 (1998), the Supreme Court cited Allan, supra. and Shade, supra., with approval in upholding the *res gestae* doctrine.

The State respectfully contends that Ms. \_\_\_\_\_ cannot tell the entire story of this kidnapping without referring to other crimes and acts which the defendant committed during the kidnapping and on previous occasions during their stormy two and a half year relationship. She must be allowed to testify to the previous acts of violence the defendant visited upon her in order to establish the terror she felt during the ride he took her on late on October 10, 1999, and early on October 11, 1999. Moreover, she must be allowed to testify to the defendant's repeated threats to kill her and her daughter while they were on this ride of terror. Additionally, she must be able to testify to the repeated acts of domestic battery the defendant committed on her prior to and during this ride. Also, she must be allowed to testify that in their room prior to their departure on this ride, the defendant had tried to intimidate her with a leather belt and had held her on the bed against her will. Finally, she should be allowed to testify that her daughter, Stephanie, was present during this ride and was, in effect, a victim of second degree kidnapping as well. All of this testimony is highly probative of the issue of whether or not the defendant held Ms. Horner against her will during the time he had her in the automobile. Additionally, she cannot tell the full terrorizing story of this crime without the necessary references to all of these uncharged crimes or acts of the defendant.

Therefore, the State respectfully moves this Honorable Court to admit the proffered testimony during its case in chief on the basis of the well founded *res gestae* doctrine.

B. Evidence of the Defendant's Intent.

NRS 48.045(2) provides in pertinent part:  
Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of...intent,....

**IV. CONCLUSION**

Based upon the legal arguments and legal precedents and authority cited herein above, the State respectfully contends that the proffered evidence of uncharged crimes, wrongs, or acts of the defendant is admissible under the *res gestae* doctrine set out in NRS 48.035 and to prove the intent and criminal nature of the defendant's acts as exceptions to the prohibitions of NRS 48.045(2). For these reasons, the State respectfully moves this Honorable Court for admission of the proffered evidence in its case in chief.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

RICHARD A. GAMMICK

District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Other Act Evidence Introduction by Defense**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

## II. STATEMENT OF THE FACTS

### III. ARGUMENT

In Petrocelli v. State, 101 Nev. 46 (1985), the Nevada Supreme Court held that before evidence of a prior bad act or collateral offense could be admitted into evidence, the District Court must first conduct a hearing outside the presence of the jury. At the hearing the Court must determine whether the evidence is logically relevant to the case at hand, whether the alleged act has been proven by clear and convincing evidence, and whether the probative value of the proffered evidence is outweighed by any unfair prejudicial effect. Petrocelli, Id., at pages 51-52.

Although Petrocelli involved the State attempting to utilize prior bad acts committed by the defendant, there is nothing in the language of Petrocelli that indicates its procedural requirement should not also apply to prior bad acts evidence offered by the defense.

To the best of the undersigned's knowledge, the Nevada Supreme Court has not yet decided the issue of whether a hearing outside the jury's presence is required where the defense seeks to introduce prior bad acts evidence. However, in at least one case the Nevada Supreme Court approved a procedure whereby a District Court required a Petrocelli hearing outside the jury's presence to determine the admissibility of alleged prior bad acts committed by a State's witness. After holding the Petrocelli hearing, the trial court determined that the evidence should be excluded. The Nevada Supreme Court approved the trial court's procedure and affirmed the jury's verdict of guilty and sentence of death. See Leonard v. State, 114 Nev. 1196, 969 P.2d 288, at page 295.

Nevada's substantive prior bad acts rule is contained in NRS 48.045(2). That section provides:

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

The use of the words "a person" rather than "a defendant" make clear that the rule applies not only to evidence offered against criminal defendants, but also evidence offered against victims, witnesses, and any other persons. To put it succinctly, the rule precludes either side from presenting evidence of prior bad acts to attack the character of any person.

NRS 48.045(2) was taken verbatim from Federal Rule of Evidence 404(b). Criminal defendants have attempted to argue that the character assassination prohibition of the rule should only apply to situations where the prior bad acts evidence is being offered by the State. The Federal Courts have soundly rejected this argument.

In U.S. v. Puckett, 692 F.2d 663 (10th Cir. 1982), the Court provided a thoughtful analysis of the issue:

The trial judge excluded the evidence [offered by the defendant] pursuant to Fed. Rule Ev. 404(b) which provides, in part:

'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith.' (Emphasis in original). The rule also states several exceptions, not applicable here, under which such evidence may be admitted. Despite the plain language of the rule, [appellant] urges that the prohibition of 404(b) was not intended to apply to situations in which a defendant wishes to introduce evidence of wrong doing by another person in order to establish his own innocence. He argues the policy underlying the rule is based upon a fear that a jury will rely on evidence that a defendant has, at other times, committed bad acts to convict him of the charged offense. Thus, he contends, the rule should not apply to instances in which the proffered evidence will not tend to show criminal disposition.

We are not inclined to interpret the rule so narrowly. Review of the advisory committee notes on the proposed rules [of evidence] indicates that the members of the committee were concerned not only with the prejudicial impact to a defendant in admission of extrinsic acts of evidence, but also with its limited probative value. The committee's note to rule 405 provides, in part:

Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as 'circumstantial.'...the circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof. Puckett, Id., at page 671.

The Court then held that the trial court had properly excluded the prior bad acts evidence offered by the defendant.

### **CONCLUSION**

The character provisions of NRS 48.045/FRE 404(b) apply equally to the prosecution and defense. See Discussion, supra. Likewise, the procedural requirements of Petrocelli v. State, should apply equally to both parties.

As this Court is aware, criminal defendants frequently attempt to introduce prior bad acts evidence pertaining to the victim or State's witnesses which tarnish the character of the victim or witnesses. Although objections by the prosecutor are frequently sustained, the jury can be tainted by the mere asking of the question which in turn causes the prosecution to object in the jury's presence. That is precisely why, in the case of prior bad acts evidence offered by the State against the defendant, Petrocelli and related cases have required a hearing regarding the admissibility of the evidence outside the jury's presence.

The State respectfully requests that this Court enter an Order that the defendant be precluded from offering prior bad acts evidence, or asking any questions pertaining thereto, until he has secured Court approval in a Petrocelli hearing outside the jury's presence. In other words, the State is merely asking that the defendant be required to abide by the same rules of fairness that the prosecution routinely abides by.

**Out-of-Court Statement Child Under 10 Admissibility**

CODE 2490  
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

NOTICE OF INTENT TO USE PRIOR STATEMENTS OF WITNESSES

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby gives this Notice of Intent to Use Prior Statements of Witnesses. This Motion is supported by all papers and pleadings on file herein, the attached Points and Authorities, and any oral argument this Honorable Court may entertain on this Motion.

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

LEGAL ARGUMENT

NRS 51.385 states in pertinent part:

1. In addition to any other provision for

admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:

(a) Court finds, in a hearing out of the presence of the jury, that the time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) Child either testifies at the proceeding or is unavailable or unable to testify.

2.....

The Supreme Court of Nevada has upheld the constitutionality of this statute and has found that it does not violate the Confrontation Clause of the United States Constitution. See Bockting v. State, 109 Nev. 103, 847 P.2d 1364.

The Court has also required strict compliance with the provision for a hearing out of the presence of the jury to determine whether or not the "...time, content, and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness;..." See NRS 51. 385; Lincoln v. State, 115 Nev. Ad. Op. 45 (1999); Quevedo v. State, 113 Nev. 35, 930 P.2d 750 (1997); Felix v. State, 109 Nev. 151, 849 P.2d 220 (1993); and Lytle v. State, 107 Nev. 589, 816 P.2d 1082 (1991).

### CONCLUSION

Based on the legal and factual discussion herein above, the State respectfully requests that this Honorable Court schedule a hearing to determine the whether or not the statements made by the juvenile victims in this case comply with the admissibility requirements of NRS 51.385 and that this hearing be

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

**Own Recognize Release Opposition**

CODE 2645  
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO DEFENDANT'S MOTION FOR OWN RECOGNIZANCE RELEASE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, by and through \_\_\_\_\_, Deputy District Attorney, and files its Opposition to the Defendant's Motion for Own Recognizance Release. This is based upon the following Points and Authorities, documents filed and any hearing that may be ordered herein.

**POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

**FACTS**

**ARGUMENT**

In his Motion, the defendant claims that he should have an own recognizance (hereinafter referred to as an "OR") release based upon the fact that he had no record until this charge, his age, his length of stay in the community, his residence with his parents and that he is employed. In the alternative, he asks for a \$500.00 bail, thereby resulting in a \$13,640 reduction in bail.

1. Amount of Bail

NRS 178.498 relates to the amount of bail. It states:

If the defendant is admitted to bail, the bail must be set at an amount which in the judgment of the magistrate will reasonably ensure the appearance of the defendant and **the safety of other persons and of the community**, having regard to:

1. **The nature and circumstances of the offense charged;**
2. The financial ability of the defendant to give bail;
3. The character of the defendant; and
4. The factors listed in NRS 178.4853.

The State would point out that the defendant has pleaded guilty to one count of BURGLARY, a violation of NRS 205.060(1)(4), to wit: a *residential burglary*.

As for the rest of the factors, the defendant has not addressed his ability to pay but has picked a \$500.00 amount as appropriate. Perhaps that is all he can pay. However, that is a misdemeanor-type bail and is inappropriate for a serious felony case.

As for the remaining factors of the character of the defendant and the factors under NRS 178.4853, please see below.

2. Own Recognizance Release

The State believes that given the facts of this case and the charge of residential burglary, that the defendant is not a good candidate for an OR release.

NRS 178.4853 sets forth the factors to be considered before release without bail. Taking each prong of that statute one at a time the Court should see that an OR release is out of the question.

In deciding whether there is good cause to release a person without bail, the court as a minimum shall consider the following factors concerning the person:

1. The length of his residence in the community:

The defendant has been in Reno according to himself for 5 years. While that is not a substantial period of time, he cannot be considered to be transient.

2. The status and history of his employment:

He states who he works for but does not state for how long he has worked for this company.

3. His relationships with his spouse and children, parents or other members of his family and with his close friends:

Evidently, he lives with his parents "who are willing to lend their support" of him. There has been no statement however, of his actual relationship with them or what "lending support" means.

4. His reputation, character and mental condition:

Although no psychiatric evaluation has been done involving the defendant, the State questions the character or reputation of a man who would commit this particular crime involving a pregnant woman.

5. His prior criminal record, including, without limitation, any record of his appearing or failing to appear after release on bail or without bail:

The State is unaware of a prior criminal history.

6. The identity of responsible members of the community who would vouch for the reliability of the person:

The State knows nothing about the defendant's supervisors and cannot comment on whether or not these men are responsible members of the community.

7. The nature of the offense with which he is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of his not appearing:

The defendant has plead to a very serious felony with a 1-10 year and \$10,000 fine potential sentence. All that awaits him is sentencing at this stage of the proceedings. The State would submit that there is a rather large risk of non-appearance if he is released on an OR.

8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release:

The State believes that since the people involved as victims in this case were known to the defendant, that the likelihood that they would be in danger on his release would be great. In September the pregnant victim in this case was 6-7 months pregnant. At this time, she is either 9 months pregnant or will have just delivered a baby. Either way she is vulnerable to another such incident. The State believes that the OR should be denied on this basis alone.

9. The likelihood of more criminal activity by him after he is released; and

The defendant knows where the victim lives and there has not been an adequate explanation as to why the event occurred in the first place.

10. Any other factors concerning his ties to the community or bearing on the risk that he may willfully fail to appear.

### **CONCLUSION**

For all of the foregoing reasons, the State would oppose the defendant's motion for an OR release and in the alternative would oppose the defendant's release on bail at an amount of \$500.00. While the State believes that the defendant is a danger to the community, the State would recommend the standard bail of \$3500.00 for a burglary charge if the Court is inclined to release the defendant on bail.

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Pat Search Terry Stop**

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Attorney for the Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

CASE NO.

v.

COURT

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO MOTION TO SUPPRESS**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, Washoe County, and \_\_\_\_\_, Deputy District Attorney, and files this OPPOSITION TO MOTION TO SUPPRESS (hereinafter, "Opposition"). The Opposition is pursuant to the United States Constitution, the Nevada Constitution, NRS 171.123, Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526 (1994), Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517 (1983), Oregon v. Mathiason, 429 U.S. 492, 94 S.Ct. 711 (1977), Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972), Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), Miranda v. Arizona, 384 U.S. 436, 85 S.Ct. 1602 (1966), State v. Sonnenfeld, 114 Nev.Adv.Op 73 (1998), State v. Burkholder, 112 Nev. 535 (1996), Gamma v. State, 112 Nev. 833 (1996), State v. Wright, 104 Nev. 521 (1988), Carlisle v. State, 98 Nev. 128 (1982), Rusling v. State, 96 Nev. 773 (1980), Stuart v. State, 94 Nev. 721 (1978), the Points and Authorities attached hereto and incorporated herein by this reference, all the pleadings, papers and authorities on file with this Court in this action, the testimony to be presented on February 17, 1999, at the hearing on this motion, and any oral argument the Court requires.

Dated this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By: \_\_\_\_\_

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

ARGUMENT

The defendant's motion raises two main issues. Issue "A" addresses the evidence collected during the contact between the police and the defendant. Issue "B" addresses statements made by the defendant during that contact. The State will address the issues in the order presented.

A. ALL OF THE PHYSICAL EVIDENCE SEIZED SHOULD BE SUPPRESSED  
BECAUSE THE EVIDENCE WAS SEIZED THROUGH UNLAWFUL  
SEARCH OF DEFENDANT'S PERSON.

The defendant's motion appears to make the broad assertion that all the contact between the defendant and law enforcement during the incident in question was unconstitutional. Clearly, such an assertion is untenable. The initial contact between the defendant and law enforcement was nothing more than a consensual contact between the parties. The Nevada Supreme Court has addressed such a situation in State v. Burkholder, 112 Nev. 535 (1996). In Burkholder RPD officers observed Burkholder conducting himself in a manner consistent with the actions of a drug dealer or user. The officers approached Burkholder and identified themselves. The officers ". . . asked Burkholder if he would answer a few questions. Burkholder replied 'yes'." Burkholder, 112 Nev. at 537. Burkholder also answered the basic questions put to him without a *Miranda* warning. Id.

In analyzing the situation the Nevada Supreme Court first acknowledges Terry v. Ohio, 392 U.S. 1 (1968), and its progeny. The Court then states, "[m]ere police questioning does not constitute a seizure. Florida v. Bostick, 501 U.S. 429, 434 (1991)." Burkholder, 112 Nev. at 538. The Court goes on to state:  
[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Burkholder, 112 Nev. at 538-39 (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)).

The inescapable conclusion, based on Burkholder, is that the initial contact between the defendant and law enforcement was nothing more than consensual questioning. Any allegation that the law enforcement were

in a place they were not allowed to be, or illegally detaining the defendant initially is simply not based on the facts presented.

The defendant's motion claims that the contact was a violation of his Fourth Amendment rights as outlined in Terry, *supra*. Again, the claim is not supported by federal law or the law in Nevada. The defendant's claims in this area are nothing more than a shortsighted glance at a broad issue. When the facts are applied to the law it becomes obvious that the officers did not violate the defendant's rights.

The Nevada Supreme Court has long followed the ruling announced in Terry. There is a two-prong test to determine whether an investigative detention passes constitutional muster:

[In] determining whether the seizure and search were "reasonable" our inquiry is a dual one--whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

State v. Sonnenfeld, 114 Nev. Adv. Op. 73 (1998) (quoting Terry, 592 U.S. at 19-20). The Nevada Legislature has codified this seminal area of constitutional law in NRS 171.123.

In Rusling v. State, 96 Nev. 778, 781 (1980), the Nevada Supreme Court states: Even though probable cause may not exist to place a person under arrest, a police officer may, under appropriate circumstances and in proper manner, approach and detain a person for the purpose of investigating possible criminal behavior. Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); Stuart v. State, 94 Nev. 721, 722, 587 P.2d 33, 34 (1978); Jackson v. State, 90 Nev. 266, 267, 523 P.2d 850, 851 (1974); Wright v. State, 88 Nev. 460, 464, 499 P.2d 1216, 1219 (1972); NRS 171.123(1).

The facts in Rusling are on point with the issues presented in the defendant's motion. The appellant was stopped by Las Vegas police because he resembled a person seen fleeing from an abandoned vehicle. The police searched for the person who fled for approximately one hour. They eventually stopped the appellant because he resembled the person they saw fleeing. See, Rusling, 96 Nev. at 780. The Court held that the brief detention and search of the defendant was appropriate. The Court noted that the following factors in coming to this decision:

Appellant emerged from the area where the police officers had reason to believe the suspect was lurking; he matched the description broadcast by Officer Harber. Officer Shelton was, therefore, justified in approaching appellant and stopping him for the purpose of further investigation.

Id., 96 Nev. at 781.

In State v. Wright, 104 Nev. 521 (1988), the Court again addressed the brief detention associated with a *Terry* stop. The facts are even more attenuated than those in Rusling. In Wright the appellant was driving a

vehicle similar to one involved in a robbery that had occurred the previous evening. The vehicle was not the same. The police had information that the robbery suspects were black, yet the occupants of the car were white. Further, the vehicle was only "in the area" of the previous robbery. The police found a bullet in plain view which led to further contraband. The appellant sought suppression of all evidence based on Terry.

The Nevada Supreme Court held that the officers were correct in briefly detaining the vehicle and its occupants even with these facts. The Court stated:

A stop is lawful if police reasonably suspect that the persons or vehicles stopped have been involved in criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Stuart v. State, 94 Nev. 721, 587 P.2d 33 (1978); Ildefonso v. State, 88 Nev. 307, 496 P.2d 752 (1972); NRS 171.123. \* \* \* The officers could reasonably decide that vital information could be obtained from examining the vehicle and briefly questioning its occupants. This provided a particularized and objective basis for stopping Wright's vehicle. Cortez, supra, 449 U.S. at 417, 101 S.Ct. at 694.

We conclude that the stop was reasonable and lawful, and did not violate respondent's constitutional rights. The bullet found lying on the floorboard was in plain view; therefore its discovery was not unlawful. California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); Wright v. State, 88 Nev. 460, 499 P.2d 1216 (1972).

Wright, 104 Nev. at 523.

The Nevada Supreme Court has held that it was not a *Terry* violation for officers to stop a vehicle based on a tip from a bar tender. Sonnenfeld, supra. The Court has also held that it is not a *Terry* violation to stop a vehicle based only on the fact that the trunk lock was missing. The officer was investigating whether the vehicle was stolen. Marijuana seeds found in plain view were deemed admissible after the stop. Stuart v. State, 94 Nev. 721, 722-23 (1978) ("Under these circumstances, we believe the officer's conclusion was reasonable and he was justified in stopping the vehicle for routine questioning and investigation. Since the officer had lawfully attained the position from which he observed the marijuana in plain view, he had a right to seize it and, therefore, the marijuana was properly admitted." (citations omitted)).

With the above cited cases as a framework, it is difficult to see what was inappropriate about the RPD officers' actions in this case. The officers had immediately arrived on a report of a call of two people tampering with slot machines. They arrived less than ten minutes after the call. The store clerk pointed out the two people she was calling in reference to. Clearly, the brief detention was in furtherance of the investigation of criminal behavior. The rhetorical question must be asked, "If Wright was not a *Terry* violation (stop occurring the day after the crime with a car that is a different model and two individuals that are not even the same race as the original

suspects), then how is this case a *Terry* violation?" The answer is that it simply is not.

The defendant's motion makes a "pretext stop" argument. The defendant attempts to buttress this argument by a reference to Alejandre v. State, 111 Nev. 1235 (1995). In a footnote, the defendant concedes that Alejandre has been directly overruled by both Gamma v. State, 112 Nev. 833 (1996), and Wren v. United States, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1769 (1996). The State is unable to follow the mental gymnastics which would allow an overruled case to somehow control the issues presented by the defendant's motion. Suffice to say that both Alejandre and Gamma addressed the stop of vehicles for minor violations and subsequent searches. Those issues have no bearing in the present case given the fact that the officers were conducting a legal investigation pursuant to Terry and the defendant's consent.

The defendant's motion claims that the officers did not have a search warrant, consequently they did not have a right to search the defendant's person. This contention ignores the fact that the defendant consented to the search. As discussed, *supra*, consent negates the need for a warrant. Further, given the defendant's strange and unresponsive behavior and the officers knowledge that he had been using a piece of metal to pry the machines, the officers were within the edicts of NRS 171.1232.

A non-invasive "pat search" has long been approved by the United States Supreme Court. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923 (1972). In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130 (1993), the Court held that a pat search for weapons was appropriate simply because a person walked away from officers and entered an alley. There was no indication that there were weapons on the individual. The concern arose from his evasive behavior and the fact that he had been seen leaving a "notorious 'crack house'." Id., 508 U.S. at 368. The defendant's behavior in the instant case coupled with the officer's knowledge that a piece of metal was involved was enough to give them a right to do a "pat search".

During the "pat search" the officers detected further paraphernalia in the defendant's pockets.

They were entitled to remove those items. In Dickerson, *supra*, the Court held:

"[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id., 508 U.S. at 345-76. Nothing that the officers did on September 22, 1997, violated this holding.

The seizure of the drug pipe found in the defendant's back pocket was appropriate. It was in "plain-view", consequently the officers could seize it. The United States Supreme Court has held, "[u]nder that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." Dickerson, 598 U.S. at 375 (citations omitted). The defendant attempts to get around this pernicious fact by alleging that the officers somehow did not have a lawful right to be where they were when the drug pipe was observed. The assertion is simply not supported by the facts. The officers were summoned to remove the defendant from the store. They were in a public place. Even if they did not conduct the legal *Terry* stop, the officers would still have observed the drug pipe when the defendant stood to leave.

The defendant looks into his crystal ball and comes up with two exceptions to the warrant requirement that he anticipates will be argued by the State: Terry and "plain view". He was correct. The defendant should have looked deeper, however, because he ignored the final deleterious exception which completely trumps all arguments presented in the defendant's motion: inevitable discovery.

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984), the United States Supreme Court adopted the inevitable discovery exception to the exclusionary rule. Simply put, the Court held that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means- . . .then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." Id., 467 U.S. at 444. The Court goes on to point out, "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Id., 467 U.S. at 446. The Nevada Supreme Court has also adopted this prevailing concept of constitutional law. In Carlisle v. State, 98 Nev. 128 (1982), the Nevada Supreme Court stated:

We have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence. (Citations omitted).

Id., 98 Nev. at 129-130.

Applying the inevitable discovery doctrine to the facts presented by the defendant's motion reveals that all the physical evidence is admissible. The defendant had three outstanding warrants for his arrest. The officers, as a matter of course, would have run the defendant to determine if he had any outstanding warrants. When this occurred they would have placed the defendant into custody and the drugs would have been found during the standard inventory of his property upon booking at the jail. Consequently all the defendant's argument is for naught.

In the end, the defendant's motion is built on a foundation of sand. His claim fails because its initial premise is simply not correct. That premise is that the *Terry* stop was bad. It was not. The officers acted in complete compliance with the law. Assuming, arguendo, that the *Terry* stop was bad, the evidence is still admissible given the inevitable discovery of the evidence. For all the foregoing reasons, the defendant's motion regarding physical evidence should be denied.

**B. ALL OF MR. GEISINGER'S STATEMENTS WERE OBTAINED AS A RESULT OF CUSTODIAL INTERROGATION WITHOUT MR. GEISINGER'S FIRST BEING INFORMED OF HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND THUS, ALL STATEMENTS SHOULD BE SUPPRESSED AS UNLAWFULLY OBTAINED.**

The analysis of this issue is moot given the Burkholder, *supra*. The defendant consent in the same fashion as the suspect in that case.

Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, \_\_\_ (1966), requires an explanation of rights during "custodial interrogation". An officer's obligation to administer the warning attaches, "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495, 94 S.Ct. 711, 74, 50 L.Ed.2d 714 (1977). The "ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.d 1275 (1983). "Custody" depends on an objective analysis of the circumstances, not a subjective analysis. Stansbury v. California, 511 U.S. 318, \_\_\_, 114 S.Ct. 1526, 529 (1994). In order to require the *Miranda* warning there must be both custody and interrogation.

Not all instances of police questioning are, however, custodial and/or interrogation. The United States Supreme Court has specifically removed *Terry* stops from the rubric of Miranda and its progeny. In Berkermer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), Justice Marshall, speaking for the Court, declined to extend *Miranda* warnings to traffic stops and analogous *Terry* stop situations. The Court found that these situations

are "substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself, and in subsequent cases in which we have applied *Miranda*." Berkermer, 468 U.S. at 439 (citations omitted).

The officers were not required to inform the defendant of his *Miranda* rights based on Berkermer. The questioning was brief, and related only to possible items which may be found during the lawful pat search. It was neither custodial, nor interrogatory. All of the defendant's statements are admissible.

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

02167851

**Pat Search Terry Stop II**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

Law enforcement officers are permitted to stop individuals where there is a reasonable and articulable suspicion that the person is committing, has committed or is about to commit a crime. Terry v. Ohio, 392 U.S. 1 (1968).

THE FOURTH AMENDMENT DOES NOT APPLY BECAUSE PEREZ CONSENTED TO THE OFFICER'S SEARCH AND THE TRAFFICKING QUANTITY OF METHAMPHETAMINE THAT WAS SEIZED AS A RESULT OF THAT SEARCH IS ADMISSIBLE.

"To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion." State v. Burkholder, 112 Nev. 535, 539, 915 P.2d 886 (1996), *citing* Schneckloth v. Bustamonte, 412 U.S. 218, 248, 93 S.Ct. 2041, 2058, 36 L.Ed.2d 854 (1973). "Voluntariness is determined by ascertaining whether a reasonable person in the defendant's position, given the totality of the circumstances, would feel free to decline a police officer's request or otherwise terminate the encounter." Burkholder, *citing* Florida v. Bostick, 501 U.S. 429,434, 111 S.Ct. 2382, 2386 (1991). "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Burkholder, *citing* Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988).

Finally, "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." Id. *citing* Schneckloth, 412 U.S. at 248-49, 93 S.Ct. at 2059. As such, numerous cases have held a consent voluntary even where the police did not inform the accused that they could refuse the police's requests. *See generally* United States v. Gonzales, 979 F.2d 711 (9th Cir.1992).

In Burkholder, the Nevada Supreme Court reversed a district court's order granting suppression of evidence. The district court had determined that a drug suspect had not provided consent. In short, the Burkholder case involved an officer with a badge displayed around his neck, who approached an individual on the street, identified himself as a police officer and asked the individual for permission to search for weapons and drugs. Burkholder at 539, 888. In that case, the suspect, who was acting nervous, agreed to the search. Id. The officer in that case never told the suspect that he was free to go or that he could decline the officer's request to search. Id. During the search, the officer located methamphetamine inside the suspect's jacket. Id.

In reversing the district court's order suppressing the methamphetamine, the Burkholder Court noted that the encounter and the brief conversation prior to the search occurred on a public street. In addition, that Court further noted that, despite the fact that the officer had identified himself as a police officer and showed his badge, the evidence did not indicate that the officer there blocked the suspect's ability to proceed down the sidewalk, physically touched the suspect, displayed his weapon to the suspect, used a commanding tone in his questions to the suspect, nor made any threats to the suspect. Id.

Based on the above criteria, the Burkholder Court reversed the ruling of the district court and found that the suspect had voluntarily consented to that search. Id. The Court reached this ruling despite the suspect's claim that he was not told that he could decline to answer Frelove's requests. Specifically, and in light of the public location of the officer's questioning and the officer's non-coercive conduct towards the suspect during the questioning, that Court concluded that the suspect's consent to the search was voluntary.

PEREZ' further reliance on Minnesota v. Dickerson, 113 S.Ct. 2130 (1993), is misplaced and, again, completely vitiated by PEREZ' own conduct.

In Minnesota v. Dickerson, the United States Supreme Court reviewed the issue of whether and when an officer's plain feel would allow him to legally seize items of evidence that were not weapons. In reviewing the search of a suspect where officers felt, then seized, contraband, the Dickerson Court held that assuming a legal stop and a legal frisk, a police officer cannot seize an item that is not a weapon unless it is immediately apparent from the officer's frisk that it is contraband.

### CONCLUSION

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Pellet Gun Deadly Weapon**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

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THE STATE OF NEVADA,

Plaintiff,

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**MOTION TITLE**

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DATED this \_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

The sentence enhancement for the use of a "firearm or other deadly weapon" in the commission of a crime is governed by NRS 193.165. In Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), our court analyzed NRS 193.165 and substituted the more narrow "inherently dangerous weapon" test in place of the "functional test" to define the term "deadly weapon."<sup>6</sup> The Nevada Supreme court held that "...some weapons can be determined as a matter of law to be inherently dangerous, and thus the only question remaining for the trier of fact is whether the deadly weapon was used in the commission of the crime". Stroup v. State, 110 Nev. 525, 874 P.2d 769 (1994), citing Zgombic, supra, 106 Nev. at 577.

First, the charge as pled in the Information provided the defendant with the requisite notice that a deadly weapon was used in the commission of the murder. The purpose of pleadings is to provide an accused with notice of the charges against him of sufficient specificity to enable him to defend against them. In Hale v. Burkhardt, 104 Nev. 632, 764 P.2d 866 (1988), our court held that the criminal acts that the defendant is charged to have committed, contain a sufficiently 'plain, concise and definite' statement of the essential facts such that it would provide a person of ordinary understanding with notice of the charges." Id at 638.

Here, the defendant was advised that a deadly weapon enhancement was being sought by virtue of the statutory notice in the heading of the charge (NRS 193.165), as well as in the body of the charge text ("... by shooting and/or beating in the head"). This is sufficient to provide a person of ordinary understanding that the murder weapon was a gun. A gun is a deadly weapon as a matter of law. NRS 193.165. The jury was provided with the expert testimony of Forensic Pathologist Ellen Clark, M.D. and Coroner Vernon McCarty. Both Dr. Clark and Mr. McCarty opined that the trauma to the head was most consistent with a gunshot wound to the head; primarily due to the radiating fractures and an absence of bone consistent with a bullet track through the skull.

---

<sup>6</sup>"Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction will, or is likely to, cause a life-threatening injury or death." Zgombic, supra. The former functional test was reinstated by the Nevada Legislature which redrafted NRS 193.165. It was signed into law on October 1, 1995 as former Assembly Bill 624. Therefore, the controlling law for the offense committed here on August 21, 1994 is the inherently dangerous weapon test.

Further, the jury made a specific finding that a deadly weapon (a gun) was used in the murder and further, the mechanism was by firing the gun's projectile into the victim's skull.<sup>7</sup> This court heard, considered and denied the defense's oral motion to strike the deadly weapon at the conclusion of the State's case. The defendant's contention has no more merit now that the jurors have unanimously agreed a deadly weapon was used by the defendant to kill Renee Bendus. Stroup, supra, 110 Nev. at 528.

Second, the State and defense jointly agreed upon the submission to the jury of Instruction 34, the law of Zgombic, supra. Further, no objection was subsequently made by the defense at the settlement of instructions.<sup>8</sup>

### CONCLUSION

For the reasons above, the State respectfully requests that this court deny the defendant's motion to strike deadly weapon enhancement.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

---

<sup>7</sup>As opposed to the weapon being used as a club or other manner inconsistent with the inherent purpose and design of a gun.

<sup>8</sup>The court will recall that the original verdict form submitted by the State was revised at defense request. Specifically, the defense requested, without objection that page two include the text: "If your answer is yes please identify the weapon and describe the manner of its use." The jury replied: "The weapon was a gun. The manner was a gunshot to the head."

**Pellet Gun Deadly Weapon Additional Discussion**

CODE  
Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

### I. STATEMENT OF THE CASE

### II. STATEMENT OF THE FACTS

### III. ARGUMENT

NRS 193.165 sets forth the additional penalty for the use of a deadly weapon in the commission of a crime.

1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or . . . in the commission of a crime shall be punished by imprisonment in the state prison for a term . . .

5. As used in this section, "deadly weapon" means: . . .

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350. (Emphasis added).

NRS 193.165 sets forth the penalty and then refers the reader to other statutes, specifically NRS 202.265 for a definition of dangerous or deadly weapon.

NRS 202.265 defines a firearm:

(b) "Firearm" includes:

(2) Any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

In this case, the defendant used a bb gun which is spring operated and expels a metallic projectile.

## II

### NRS 193.165 STATES "A DANGEROUS OR DEADLY WEAPON"

NRS 193.165 subsection 5 states:

5. As used in this section, "deadly weapon" means: . . . (c) **A dangerous or deadly weapon** specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350. (Emphasis added).

The legislature defined "deadly weapon" as a dangerous or deadly weapon. The Legislature did not limit the definition to NRS 202.253, a firearm, but instead expanded the definition to include "a dangerous or deadly

weapon." This expansion of the definition clearly shows the intent to not limit the enhancement to cases involving firearms.

Clearly a spring operated bb gun is a "dangerous or deadly weapon" as intended by the Legislature.

### III

#### **THE LEGISLATURE DID NOT USE THE STATUTORY DEFINITION OF A FIREARM IN NRS 193.165**

The Legislature in drafting the additional penalty of "Use of a deadly weapon" did not use the statutory definition of a firearm to define "other deadly weapon". Had the Legislature intended to limit the enhancement it could have used the Statutory definition of a firearm NRS 202.253. However, in NRS 193.165 the Statute specifically states "a dangerous or deadly weapon specifically described in NRS 202.255, 202.265 etc. The Legislature did not intend to limit the definition of deadly weapon to only firearms but to expand that definition by including the five (5) specific NRS provisions that define various dangerous and deadly weapons.

The defense argues that the Court should look to NRS 202.253 for the definition of "firearm" for the purposes of the dangerous or deadly weapon enhancement. As stated above that argument is quite a stretch considering that NRS 202.253 is not even mentioned in NRS 193.165. On the other hand, NRS 202.265 which includes a spring operated bb gun, is specifically included in NRS 193.165.

"It is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." W.R. Co. v. City of Reno, 63 Nev. 330, 172 P.2d 158 (1946).

In this case, a spring operated bb gun is a dangerous or deadly weapon.

### IV

#### **A PELLET GUN IS ALSO A DANGEROUS OR DEADLY WEAPON**

Defense counsel repeatedly refers to the weapon as a pellet gun. Even a pellet gun is included within NRS 202.265.

"Any **device** from which a metallic projectile, including any ball bearing or **pellet**, may be expelled my means of spring, gas, air or other force."

#### **CONCLUSION**

The deadly weapon enhancement statute, NRS 193.165 defines "deadly weapon" as a dangerous or deadly weapon as specifically described in five (5) statutes. NRS 202.265, utilized in NRS 193.165, holds that a firearm includes a spring operated bb gun. Since the defendant used a spring operated bb gun he is subject to the enhancement for use of a deadly weapon or more specifically "dangerous or deadly weapon. The State therefore respectfully requests that the Motion to Strike be denied by this Honorable Court

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney



addresses dialed to/from telephone number \_\_\_\_\_, which is assigned to a subscriber identified as \_\_\_\_\_ at \_\_\_\_\_ in \_\_\_\_\_ Nevada.

That the \_\_\_\_\_ is currently conducting an investigation into the suspected criminal activity of \_\_\_\_\_ by committing the offense of \_\_\_\_\_

Applicant certifies that the information likely to be obtained by the requested installation and use of said pen register/trap and trace device is relevant to this ongoing criminal investigation.

Further, Applicant requests that this court direct the \_\_\_\_\_, a communication common carrier, and any landlord, custodian or other person, to forthwith furnish the \_\_\_\_\_ with all of the information, facilities and technical assistance necessary to unobtrusively accomplish the installation and use of the pen register/trap and trace device. Application further states that, according to NRS Chapter 179, persons providing said assistance to \_\_\_\_\_ shall, upon request, be reasonably compensated by \_\_\_\_\_ for their expenses incurred in providing such assistance.

WHEREFORE, it is respectfully requested that this Court grant and order:

1. Authorizing the installation and use of a device to register telephone numbers dialed to/from telephone number \_\_\_\_\_ for a period not to exceed sixty (60) days;

2. Directing \_\_\_\_\_, a communications common carrier, and any landlord, custodian or other person, to forthwith furnish officers of the \_\_\_\_\_ will all information, facilities and technical assistance necessary to accomplish the installation and use of said pen register/trap and trace device unobtrusively and with a minimum of interference to the service presently afforded persons whose communications are the subject of said device;

3. Directing Nevada Bell, or any other communications common carrier, to disclose to officers of the \_\_\_\_\_ a list of subscribers, location of service, and billing addresses of telephone numbers dialed to or from the aforementioned telephone number during the period of this Order and any extension thereof;

4. Prohibiting the \_\_\_\_\_

telephone company representative and all persons, landlords, or custodians providing assistance to officers in their investigation or in the use of this device from disclosing the existence of this investigation or the use of this device;

5. Authorizing, upon request, reasonable compensation by the investigating agency, for reasonable expenses incurred by those providing assistance to said agency in the use of said device; and,

6. Sealing this Application, the attached Affidavit, and the Court's Order until further order of this Court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

SUBSCRIBED AND SWORN to before me

this \_\_\_\_ day of \_\_\_\_\_, .

\_\_\_\_\_  
NOTARY PUBLIC

**Pen Register Order Blank Form**

CODE  
Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.

IN THE MATTER OF THE APPLICATION,  
OF THE STATE OF NEVADA FOR AN  
ORDER AUTHORIZING THE USE OF A  
PEN REGISTER TRAP AND TRACE DEVICE.

Dept. No.

Defendant.

\_\_\_\_\_ /

ORDER

Upon application of \_\_\_\_\_ of the Officer

\_\_\_\_\_ of the \_\_\_\_\_, and finding that  
said Application and Affidavit comply with the requirements of NRS 179.530 and certify to this Court that the  
information likely to be obtained by the use of a pen register/trap and trace device is relevant to an ongoing criminal  
investigation being conducted by \_\_\_\_\_, and good cause appearing therefore,

IT IS THE ORDER OF THIS COURT that a pen register/trap and trace device including but not  
limited to caller identification services, be installed on/utilized to register telephone numbers dialed to/from  
telephone line number \_\_\_\_\_, located at \_\_\_\_\_, in \_\_\_\_\_,  
Washoe County, Nevada, which telephone number is leased by or listed in the name of  
\_\_\_\_\_.

This pen register/trap and trace device is authorized pursuant tot he ongoing investigation  
concerning the activities of \_\_\_\_\_ alleged to be committing the offense(s) of

\_\_\_\_\_. This Order is to remain in full force and effect for a period not to exceed sixty (60) days, unless an extension upon application is authorized by this Court.

IT IS FURTHER ORDERED that \_\_\_\_\_ telephone company, a communications common carrier which services said telephone number, and any landlord, custodian, or other person shall furnish the \_\_\_\_\_ with all information, facilities, and technical assistance necessary to accomplish the installation and operation of this pen register/trap and trace device, including but not limited to caller identification services, unobtrusively and with a minimum of interference with the services being provided to said telephone number. Upon request, said telephone company, landlord, custodian or other person shall be reasonably compensated by the investigating agency for such reasonable expenses incurred in providing facilities and assistance pursuant to this Order.

IT IF FURTHER ORDERED that Nevada Bell, or any other communications carrier, shall disclose to the \_\_\_\_\_ a list of subscribers, location of service, and billing addresses of telephone numbers dialed to or from the aforementioned telephone number during the period of this Order and any extension thereof.

IT IS FURTHER ORDERED that the results of this pen register/trap and trace device, including but not limited to caller identification services, shall be furnished to officers of the \_\_\_\_\_ at reasonable intervals during regular business hours for the duration of this Order.

IT IS FURTHER ORDERED that any person cooperating with or providing assistance to officers with regard to this investigation and the use of this pen register/trap and trace device shall not disclose the existence of this investigation nor the use of this device, except upon order of this Court.

IT IS FURTHER ORDERED that this Order, together with the Application and Affidavit therefore, shall be and are sealed until further order of this Court.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

\_\_\_\_\_  
DISTRICT JUDGE

## Pen Register Notice and Order re Intercepted Parties

CODE  
Richard A. Gammick  
#001510  
P.O. 30083-3083  
Reno, NV 89520  
(775)328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

IN THE MATTER OF THE APPLICATION  
FOR AN ORDER ALLOWING FOR  
THE INTERCEPTION OF ORAL AND  
WIRE COMMUNICATIONS.

---

DECLARATION CONCERNING NOTICE TO INTERCEPTED PARTIES

RICHARD A. GAMMICK, District Attorney, Washoe County, Nevada, being first duly sworn, deposes and says:

1. I am the duly elected and qualified District Attorney of Washoe County, Nevada, and therefore am a person authorized under NRS 179.460(1) to seek a Court Order authorizing the interception of wire or oral communications pursuant to the provisions of NRS 179.410 to 179.515.

2. I make this declaration upon information and belief. The source of your applicant's information and basis of his belief and a full and complete statement of the facts and circumstances upon which I rely is found in the affidavit of # (officer), of the #(agency) Department, which affidavit is attached hereto and incorporated by this specific reference herein.

3. On #(date), this court entered an order authorizing the interception of communications to and from telephone number #. A copy of said order is attached hereto and incorporated by this specific reference herein.

4. As explained in the affidavit of #(officer), interception of communications continued until #(date). Thereafter #.

5. NRS 179.495 provides that within a reasonable time but not later than 90 days after the termination of the period of an order or any extension thereof, the judge who issued the order shall cause to be served on the chief of the

investigation division of the department of motor vehicles and public safety, persons named in the order and any other parties to intercepted communications, an inventory which must include notice of:

(a) The fact of the entry and a copy of the order.

(b) The fact that during the period wire or oral communications were or were not intercepted.

6. The purpose of this declaration is to assist the Court in identifying those persons who are to receive the subject inventory. The State of Nevada suggests that the inventory be served on the persons named in the applications and orders for the wire surveillance, as well as persons not named in the applications and orders who engaged in intercepted communications which were deemed apparently pertinent and whom agents were able to identify by name and address.

7. For the Court's convenience, the lengthy list of proposed recipients of inventories is provided in the document attached to this declaration as Exhibit A.

8. #(officer and agency), who supervised this wire surveillance, has advised me that both identified and unidentified persons were intercepted in apparently non-incriminating conversations, and that some persons were intercepted in potentially incriminating conversations whose exact identities and addresses have not been established. The State of Nevada submits that the interests of justice do not require service of inventories on persons intercepted in apparently non-incriminating conversations or on persons whose exact identities and addresses have not been established and asks the Court to so order.

9. Attached hereto as Exhibit B is the proposed Notice of Intercepted Communications for Service on the persons listed in Exhibit A. As to the indicted defendants, the State of Nevada intends to send the inventories via certified mail to their respective counsel of record; and as to the other individuals named in Exhibit A, we will send the inventories via certified mail to their present or last known addresses.

10. The State of Nevada requests that the Court authorize the service of inventories via the United States mail.

DATED this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

CODE  
Richard A. Gammick  
#001510  
P.O. 30083-3083  
Reno, NV 89520  
(775)328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

IN THE MATTER OF THE APPLICATION  
OF THE STATE OF NEVADA FOR AN ORDER  
AUTHORIZING THE INTERCEPTION  
OF ORAL AND WIRE COMMUNICATIONS.

\_\_\_\_\_/

ORDER REGARDING NOTICE TO INTERCEPTED PARTIES

Based on all of the information received by this Court during the course of the above-captioned matter, and pursuant to NRS 179.495,

IT IS HEREBY ORDERED that the State of Nevada shall cause a Notice of Intercepted Communications to be served upon the persons named in Exhibit A, attached to the Declaration of RICHARD A. GAMMICK.

IT IS FURTHER ORDERED that the State of Nevada shall use for this service the Notice to Parties of Intercepted Communications filed as Exhibit B to the Declaration of RICHARD A. GAMMICK. The State of Nevada shall serve this Notice to Parties of Intercepted Communications as described in the Declaration of RICHARD A. GAMMICK, that is, on the individuals known to be represented by counsel by mailing copies to their respective counsel of record, and as to the other individuals named in Exhibit A, copies to their present or last known addresses.

IT IS FURTHER ORDERED that the State of Nevada may cause the inventories to be served by certified mail via the United States Postal Service. It is not necessary that the inventories be personally served on the individuals listed in Exhibit A.

DATED this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
DISTRICT JUDGE

CODE  
Richard A. Gammick  
#001510  
P.O. 30083-3083  
Reno, NV 89520  
(775)328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

IN THE MATTER OF THE APPLICATION  
OF THE STATE OF NEVADA  
FOR AN ORDER ALLOWING FOR  
THE INTERCEPTION OF ORAL AND  
WIRE COMMUNICATIONS.

\_\_\_\_\_/

NOTICE TO PARTIES OF INTERCEPTED COMMUNICATIONS

Pursuant to NRS 179.495, this Court gives notice that:

On February 7, 2000, an application for a Court Order authorizing the interception of wire communications to and from telephone numbers (775)356-1460, was filed in this Court. Pursuant to this application, an Order was entered the same day authorizing interception of wire communications over this telephone number. A copy of the order is attached.

The Court further gives notice that during the period of the Order from \_\_\_\_\_, wire communications were intercepted.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

\_\_\_\_\_  
DISTRICT JUDGE

## Pen Register Application Sample

CODE  
Richard A. Gammick  
#001510  
P.O. 30083-3083  
Reno, NV 89520  
(775)328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

IN THE MATTER OF THE APPLICATION  
BY THE DISTRICT ATTORNEY OF THE  
COUNTY OF WASHOE  
FOR AN ORDER AUTHORIZING THE  
INTERCEPTION OF WIRE  
COMMUNICATIONS.

\_\_\_\_\_ /

### AFFIDAVIT

, does hereby swear under penalty of perjury that the assertions of this affidavit are true:

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### **CASE SUMMARY**

#### **AFFIANTS INFORMATION AND EXPERTISE**

Detective with the Washoe County Sheriff's Office states:

That I am a sworn Peace Officer within the meaning of the Nevada Revised Statute. I have been a Deputy Sheriff with the Washoe County, Nevada, Sheriff's Office for the past fourteen (14) years. Prior to this, I was a Reserve Deputy Sheriff for five (5) years. I am currently assigned to the Crimes vs. Persons section of the Detective Division, investigating homicides and other violent crimes against persons. I've been a detective for the past three (3) years.

That during the months of November and December of 1999, and January of 2000, I was in contact with and spoke to Detective Christopher McShane with the Cypress Police Department in California regarding the homicide investigation involving victim Paula Pleshe. One suspect, Gerald Robert Pleshe, and a potential co-conspirator, Mary Cruise Pleshe, live in Washoe County, Nevada, in the City of Sparks, within the area of our county jurisdiction. That the content of this affidavit has been made known to me through communications with Detective Christopher McShane of Cypress, California, Police Department.

Detective Christopher McShane with the Cypress Police Department states:

That I am a sworn Peace Officer within the meaning of the California Penal Code section 830.1(a). I have been a Peace Officer for the past twelve (12) years and three (3) months. Prior to this, I was a level one (1), Reserve, Deputy Sheriff with the Los Angeles County Sheriff's Office for two (2) years and six (6) months. I have been a sworn Peace Officer within the meaning of Penal Code Section 830.1(a) for the past fifteen (15) years. I have been certified by the California Commission on Peace

Officer Standards and Training (POST) upon completion of the course established by California Penal Code Section 629.94(a) in the legal, practical, and technical aspects of the interception of private wire communications and related investigative techniques on December 29, 1999.

Pursuant to California Penal Code Section 629.50(c), Cypress, California, Police Department Chief John D. Hensley, has reviewed and approved the application and affidavit which sets out the "circumstances in support thereof". (See Statement of Cypress, California, Police Chief John D. Hensley, Attachment B.)

I am currently employed as a Police Detective with the Cypress, California, Police Department, in a supervisory capacity. Since I was promoted to the rank of Corporal in May of 1997, I have been entrusted with the responsibilities of the acting Watch Commander for patrol on more than twenty five (25) occasions. This responsibility includes overseeing, supervising and directing police personnel within the Patrol Division, while acting as the Watch Commander and performing station responsibilities as needed. As a Corporal assigned to General Investigations, I have been entrusted with the responsibilities of acting Investigations Sergeant on more than twenty-five (25) occasions. These responsibilities include supervising all investigations within the Investigations Bureau. I currently review all crime reports generated within the police department and assign all follow-up investigations to the appropriate detectives.

Since July 1, 1999, I have been assigned to the General Investigations Bureau of the Cypress, California, Police Department, entrusted with the responsibility of investigating crimes against persons to include robberies and homicides. I have also been responsible for investigating assaults, assaults with deadly weapons, domestic violence, missing persons, natural and unnatural deaths, physical child abuse, sexual child abuse, hate crimes, and adult sex crimes.

As a field patrol officer and while assigned as a detective, I have investigated or have assisted in the investigation of at least six (6) homicide crimes. I have also investigated or assisted in the investigation of approximately three hundred (300) natural and unnatural deaths, as well as violent assaults against others. During the course of these investigations I have gained experience, knowledge, training, and expertise in the field of homicidal death, natural death, suicidal death, and accidental death. This

knowledge has been primarily gained through numerous interviews of persons arrested for, or suspected in, violent assaults and homicide investigations.

While investigating these crimes, I have also had the opportunity to interview numerous victims and witnesses directly related to these crimes. I have written, secured, served, and participated in the service of search warrants related to the crimes of homicide, robberies, and violent assaults. The majority of these crimes involved the use, threatened use, or attempted use of weapons likely to produce death or great bodily injury. I have also testified in both Orange and Los Angeles County Superior and Municipal California Courts where defendants have been held to answer for their crimes of homicide, robbery, and violent assaults.

As a field patrol officer and detective, I have also had the opportunity to locate, secure, process and evaluate crime scenes related to violent assaults, robberies and homicides. Within these crime scenes, I have personally located, collected, secured and processed numerous items of evidence directly related to these crimes. These items of evidence include, hair, fibers, human bodily fluids, fingerprints, firearms, weapons likely to produce death or great bodily injury and other items of forensic value. In several of these cases, I have successfully reconstructed crime scenes to further understand the evidence in an effort to identify and locate potential suspects of violent crimes.

Between September 1995 and February 1996, I was assigned to the Special Enforcement Team as an undercover narcotics detective. During this time, I completed several criminal investigations related to large scale conspiracies to distribute controlled substances. I have also talked to persons involved in these conspiracies who are now police informants. From these people, I have gained a great deal of insight and intelligence on how these conspiracies operate.

I personally have conducted, monitored, supervised, and participated in the electronic surveillance of criminals involved in violent and high risk crimes. These surveillances have involved wearing electronic surveillance devices while working in an undercover capacity. I have personally worn the monitoring equipment during such operations. During many of these investigations, I have operated and monitored equipment used to capture communications of persons involved in the conspiracy or commission of potentially violent crimes. These communications included suspects receiving instructions

from other co-conspirators. I have also spoken with members of the Costa Mesa, California, Police Department, Washoe County, Nevada, Sheriff's Office, Santa Ana, California, Police Department, Orange County, California, District Attorney's Office and the Federal Bureau of Investigations, who have monitored and captured electronic communications of individuals who were suspects in conspiracy related crimes.

Over the past fifteen (15) years as a sworn peace officer, I have received over 1,800 hours of specialized training in the field of criminal investigations. These training courses included: Basic Reserve Police Academy (1985); Basic Police Academy (1987); Advanced Officer Course (1991); Field Training Officer Course (1992); Advance Officer Training Investigative Level (1992, 1993, 1998); Narcotic Abatement (1995); Narcotic Investigations (1995); Supervisory Course (1995); Clandestine Lab Investigations (1995); Officer Involved Shooting Investigations (1996); Advanced Crime Scene Investigation and Reconstruction (1996); and, Electronic Communications Intercept Course (1999).

I also attend regular, monthly meetings and seminars sponsored by the Orange County Homicide Investigator's Association, California Homicide Investigator's Association, Orange County Robbery Investigator's Association, California Narcotic Officer's Association, and the Orange County, California, Department of Corrections-Parole. During these meetings, the sponsoring agencies have supplied attendee's with various aspects of homicide, robbery, and assault investigation's training. During these meetings, I have also interacted with numerous other homicide, robbery, and assault detectives from various Orange, Los Angeles, Riverside, and San Bernardino County agencies and discussed current crime trends and investigative techniques amongst communities. On a weekly basis, in the Investigations Bureau within the Cypress Police Department, I receive and read numerous magazine and newspaper articles, crime bulletins, newsletters, and state-wide teletypes describing various crimes of homicide, robbery and violent assaults.

I hereby make application to intercept wire electronic communications on the residential telephone located at 1498 Shady Oak Drive, Sparks, Nevada. The telephone located at the residence at 1498 Shady

Oak Drive, Sparks, Nevada, has the assigned telephone number (775) 356-1460, hereafter referred to as the target telephone line.

Probable cause exists to believe that Gerald Robert Pleshe, Mary Cruise Pleshe (A.K.A. Mary Crooker) and Candace Lynn Restivo (A.K.A. Candace Saude), have committed crimes as discussed below, and that their conversations about those crimes will be intercepted on the target telephone lines discussed herein.

#### **STATEMENT OF FACTS**

#### **USE OF A MAIL COVER**

On December 10, 1999, Detective Bruce with the Cypress Police Department obtained a mail cover for both Gerald Pleshe and Candace Saude (A.K.A. Candace Restivo) through the United States Postal Inspection Service. A mail cover is an investigative tool used to acquire evidence of a commission or attempted commission of a crime. The mail cover revealed that Gerald Pleshe and Mary Pleshe both receive mail at 1498 Shady Oak Drive, Sparks, Nevada, and Candace Saude (A.K.A. Candace Restivo) receives mail at 908 Jimmie Kerr Road, Haw River, North Carolina.

#### **SUMMARY OF PROBABLE CAUSE**

The following summary of facts are offered to support a finding of probable cause against Gerald Robert Pleshe, Candace Lynn Restivo (A.K.A. Candace Saude) and Mary Cruise Pleshe (A.K.A. Mary Crooker) as having conspired to commit, and arranged for, the homicide of Paula Pleshe and later acts tending to conceal the identity of persons involved.

Paula Joy Pleshe appears to have been the intended victim for the specific act of homicide. The actual physical attack against Paula Pleshe can be reconstructed with accuracy based on witness accounts and physical evidence at the scene. The murder suspect arrived, concealed himself near her car, and waited for this particular victim. Other persons, including females, had walked nearby the suspect while he was concealed. There is no evidence that the murder resulted from the interruption of another crime such as

robbery or burglary. The victim's purse was located near her body, apparently not handled by the suspect in any manner. The knife wounds sustained in the attack were intended to have fatal consequences. Two of the wounds pierced the heart, others significantly penetrated the chest cavity. Finally, regarding the attack, the suspect had previously arranged for a "get away" car to be manned and parked at a location to facilitate an escape from the area.

Paula Pleshe and Gerald Pleshe were married for two (2) years prior to the homicide of Paula. It was the third marriage for both. Gerald Pleshe maintained a secret, intimate and frequent relationship with Candace Saude throughout this period. By his account he visited her nearly every morning before his work and on nearly every Monday evening.

The motives for Gerald Pleshe to arrange for his wife's murder are revealed in the circumstances surrounding their relationship just prior to the morning she was killed.

Paula Pleshe learned of the Candace Saude relationship approximately two (2) months prior to her murder and was upset about it, expressing her distress to many co-workers. Gerald Pleshe was aware that his wife had discovered the relationship. According to multiple witnesses, the marriage had become more strained and had been significantly troubled.

During the two (2) years of marriage, according to the victim's daughter, Gerald Pleshe engaged in frequent acts of sexual molestation, including intercourse, with her. Approximately two (2) weeks before the homicide, Paula Pleshe returned home early from work in the afternoon. She discovered Gerald Pleshe and her daughter (age 12) engaged in sexual activity. The extensive nature of the sexual activity was revealed to Paula Pleshe. This caused additional turmoil in the household. Gerald Pleshe agreed to attend counseling and to provide counseling for the daughter, in lieu of having the victim report the molestation to the police.

Gerald Pleshe later recanted on the promises to seek counseling. The victim insisted that he move from the residence (within two weeks) by the date of August 1, 1981. The victim told the story of the child molestation of her daughter and the August first move-out date to a number of co-workers and family members. The victim was encouraged by several persons to report the molestation activity to the police.

Gerald Pleshe financially profited from the death of his wife. She alone provided the money to purchase their house and he stood to lose financial interest once (and if) he was forced to leave. In addition, he actually profited from her death by more than two hundred thousand dollars (\$200,000) from the equity in the house which he inherited from her life insurance policy and from her profit sharing investment at her employment.

In the months prior to the homicide, Gerald Pleshe occasionally drove to work with a co-worker, Leslie Bair. Ms. Bair told investigators that Gerald Pleshe made comments such as, "I hate that woman," referring to the victim. Ms. Bair asked him why then did he stay in the relationship. Gerald Pleshe responded that the victim "was going to be worth some money some day." In another conversation, Gerald Pleshe offered the unsolicited comment, "It's easy to hire someone to kill a person."

The means that Gerald Pleshe employed to arrange the homicide are evident in activity that occurred shortly before the murder.

Gerald Pleshe was employed as a retail liquor salesman. He had a route that took him to approximately one hundred liquor stores in the Los Angeles County area. He generally worked alone on this route. During the course of a work day Gerald Pleshe had many opportunities to contact and meet individuals (liquor store clients and owners) with whom he and his other family and friends had no previous knowledge of or contacts with.

Within approximately two (2) weeks prior to the homicide, Gerald Pleshe had instructed his step-daughter to discontinue a practice of waving good-bye from an upstairs window to Paula Pleshe when Paula would leave from home in the mornings. Their routine was an exaggerated "good-bye" at the front door window when Paula would leave the house. The daughter would then race upstairs in time for a second "good-bye", waving from the window which overlooked the carport area. If the daughter had practiced this routine on the morning of the homicide she would have been in a position to clearly see the attack and murder of her mother.

On the morning of the homicide, Gerald Pleshe broke with his routine and left for work earlier than normal, though he did not describe any reason for doing so in later interviews. In a taped interview

two (2) days after the homicide, he was able to recall looking at his watch and noting the time to be 6:55 a.m. (the exact same time as the attack) while he was outside of a customer's business in a nearby city.

Gerald Pleshe was at the Candace Saude residence during the evening hours of the day prior to the homicide.

Gerald Pleshe has demonstrated violent behavior when confronted with losing property (financial) interest tied to relationships of women with whom he was involved. This includes the business property at Incline Village, Nevada, where Pamela Orth had been deceived into providing down payment funds to start a tow business and discovered that Gerald Pleshe and Candace Saude conspired to begin the business and later take the business from her after a six (6) month period of time had elapsed. When Pamela Orth discovered the plot, she threatened to file bankruptcy and discontinue the business. The later actions and threats (previously documented) by Gerald Pleshe included his statement to Pamela that if she did not sign over her portion of the business to him than he would have the same thing happen to her that happened to his wife in Cypress. In a similar action he threatened Candace Saude, during their 1986 break-up, when she attempted to force him from her residence (a house he claimed to have a financial interest in). She claimed to police investigators that he threatened to implicate her as having hired persons to kill his wife. In another action with his current wife, Mary Crooker, from jail he'd threatened in a telephone call (after a restraining order violation), that he would hire someone to harm or kill his wife's daughter who was living at their house at the time.

Gerald Pleshe has demonstrated his willingness to use violence against women by using a firearm to accomplish that violence. One (1) year after his wife's homicide, in a fit of anger, he placed a handgun to the head of a female at his Larwin Avenue residence while forcing her to perform certain sexual acts.

Business and personal partner, Pamela Orth, reported that during a confrontation about discontinuing their business / personal relationship Gerald Pleshe held a handgun to her head and beat her.

Candace Saude reported that during a confrontation at the time of their break-up, Gerald Pleshe pointed a handgun at her and fired two shots from the gun in her direction to frighten her.

During a 1986 interview with police detectives which he initiated, Gerald Pleshe said that he had personal, undisclosed information concerning the death of his wife. He claimed that Candace Saude had

arranged for the murder of his wife. He said that he could not reveal information which he held because he feared he would be implicated in the murder and he “did not want to go to prison.” He said he has written the information in several letters (one addressed to the Cypress Police Department) which will only be revealed at the time of his death (at the reading of his will).

Candace Saude, at the same approximate time, revealed to police investigators that she suspected Gerald Pleshe, was involved in the murder of his wife.

The current wife of Gerald Pleshe is Mary Crooker. She was a neighbor to the Pleshe residence on Larwin Avenue at the time of the homicide, and a friend of Paula Pleshe. Mary Crooker contacted the victim’s sister, Linda Roche in 1986 at the time of the break-up between Gerald Pleshe and Candace Saude. Mary Crooker was at this time involved in a dating relationship with Gerald Pleshe. She arranged a meeting which was monitored and recorded by police investigators. During the meeting she revealed she was there on behalf of Gerald Pleshe. The initial justification for the meeting was that Mary Crooker claimed to have additional information about the homicide. In fact, the meeting was an attempt by Mary Crooker to learn what information, if any, Candace Saude had provided to Linda Roche concerning the homicide. During the meeting Mary Crooker disclosed that she “knows for sure” that the homicide was a murder “for hire”, prompted by the efforts of Candace Saude. She assured Linda Roche that Gerald Pleshe had nothing to do with the murder.

Current investigators in this case have researched the information provided in this affidavit by compiling previous reports and interviews and examined incidents which have occurred during the past eighteen (18) years since the murder of Paula Pleshe. This information arrived at the Cypress Police Department in a series of segments and was recorded by officers often unfamiliar with the case. All the information, now available, has never been examined in total, prior to the "reopening" of the case in July, 1999.

Your affiant believes that there is probable cause to believe that evidence concerning the murder of Paula Joy Pleshe will be obtained through interception of wire electronic communications between Gerald Robert Pleshe, Mary Cruise Pleshe (A.K.A. Mary Crooker) and Candace Lynn Saude (A.K.A. Candace Restivo). It is believed, in particular, that communications will concern discussions regarding the

actual murder offense, including communications relating: 1) possible location and destruction of evidence; 2) identification of additional suspects; and, 3) incriminating statements regarding the status of the investigation and extensive interview by law enforcement officers. It is further believed that there is probable cause to believe that the telephone number (775) 356-1460 will be used by Gerald Robert Pleshe and Mary Cruise Pleshe in connection with the ongoing investigation.

It is thus believed that not only statements, but possibly further evidence may reasonably be obtained to further the investigation if this wire electronic communication interception Order is granted.

### **TRIGGERING COMMUNICATIONS**

Investigators are prepared to question Gerald Pleshe, Mary Pleshe, Candace Restivo, relatives and others that may have information regarding the murder of Paula Joy Pleshe. These interviews will take place in a strategic manner designed to maximize communication between the desired parties. This will be done as follows: upon triggering of the wire, six (6) Police Detectives from the City of Cypress will be in place and monitoring the wire at a location in Sparks, Nevada. At the same time, six (6) additional investigators from the Nevada State Bureau of Investigation will be conducting ground surveillance on Gerald and Mary Pleshe, their places of employment, their residence, and any other location yet unknown, in and around Sparks, Nevada. Members of the surveillance team will complete immediate follow up interviews with persons contacted by either Gerald or Mary Pleshe during this period of time.

Additionally, a Cypress Police Supervisor and Field Supervisor from the Washoe County Sheriff's Department will be coordinating and assisting with police efforts in the Reno/Sparks area during this time.

Upon initiation of the wire, Cypress Police Detectives will begin contacting Candace Suade Restivo and her immediate family members to include her husband and step-son at her residence in Haw River, North Carolina.

Simultaneously, six (6) additional detectives from the Cypress Police Department and the Orange County District Attorney's Office will be contacting approximately thirty five (35) additional family members, relatives, friends and co-workers of Candace Saude Restivo, Gerald Pleshe and Mary Crooker-Pleshe in and around the Southern California area.

Immediately following their contact with Candace Saude Restivo, Cypress Detectives will travel to Sparks, Nevada, for interviews and contact with Gerald and Mary Pleshe at their residence located in Sparks, Nevada.

The strategy for obtaining maximum results (recording an incriminating telephone statement) involves numerous police contacts, described above, with persons who will likely contact the suspected persons by telephone during the short time period wire surveillance is in place.

Through the course of these interviews, each interviewee will be told that each person related to this case will be re-interviewed immediately after his/her interview is concluded. This should stimulate each person to attempt to make telephonic contact with Gerald or Mary Pleshe at the listed target telephone number.

My prior experience has shown that after suspects are contacted by police, they will use the telephone to either alert other suspect(s) of the contact or discuss evidence in the case. Suspects utilize telephones to communicate with other members of a conspiracy because they are fearful that surveillance would possibly identify their face-to-face meetings. In this case, we are leaving each person interviewed with the impression that there is no time for such a face-to-face meeting with each other.

Based on my experience, and the experience of other officers, I believe that Candace Saude, and others yet unknown, will call Gerald Pleshe and/or Mary Pleshe, or vice-versa, and discuss with each other the events of the interview that will have been conducted by investigators. I believe that Gerald Pleshe, Mary Pleshe, Candace Restivo, and others yet unknown, will make incriminating statements regarding the murder of Paula Joy Pleshe.

#### **NATURE AND LOCATION OF FACILITIES**

The nature and location of the facilities from which or the place where the communication is to be intercepted, is described as a single family residence, one-story dwelling located at 1498 Shady Oak Drive, Sparks, Nevada, with the assigned telephone number (775) 356-1460. The residence is further described as a white wooden-slat sided house with a blue trim and a dark gray composition tile roof. The numerals

"1498" appear as brass metal numbers affixed to a vertical wooden supporting post, attached to the residence's front porch.

With the assistance of Detective Rick Garretson of the Washoe County Sheriff's Office in Reno, Nevada, and per NRS 704.201 and 704.202, an Administrative Subpoena was drafted and served to the Nevada Bell Telephone Company requesting subscriber information for the address of 1498 Shady Oak Drive, Sparks, Nevada (see attachment C). That request revealed the following subscriber information:

The phone number (775) 356-1460, is a residential telephone within the Nevada Bell Telephone Company's service area. The telephone is subscribed to in the name of Mary C. and Gerald Pleshe at 1498 Shady Oak Drive, Sparks, Nevada.

#### **FACILITIES TO BE USED**

The facilities to be used and the means by which such interception is to be made is within the County of Washoe, Nevada (NRS 179.470(1)(b)(2)).

#### **DESCRIPTION OF COMMUNICATIONS SOUGHT**

It is requested that the particular type of communications authorized to be intercepted is wire electronic communications as defined by statute, including specific discussions between Gerald Pleshe, Mary Pleshe, and Candace Saude (A.K.A. Candace Restivo) or anyone on behalf of Gerald Pleshe, Mary Pleshe, and Candace Saude (A.K.A. Candace Restivo), including others unknown, engaged in conversations related to a murder violation and/or facts and information obtained from the discussions supporting a showing of the identity and/or participation of Gerald Pleshe, Mary Pleshe and Candace Saude (A.K.A. Candace Restivo), and any associate in the commission of Murder (NRS 179.475(1)(c)).

#### **NEED FOR INTERCEPTION AND EXHAUSTION**

In accordance with NRS 179.470(1) (c), your affiant declares that conventional investigative techniques have been tried and were unsuccessful, or appear unlikely to succeed, and/or are too dangerous if tried. Based upon your affiant's experience with the Cypress Police Department and the Los Angeles County Sheriff's Office, your affiant knows that the following techniques are sometimes employed in the investigation of this type of criminal offense: a) the use of confidential informants; b) infiltration by

undercover police officers; c) visual surveillance; d) use of mail covers; e) use of a pen register; f) use of the grand jury in its investigative capacity; g) examination of physical evidence; h) interviews with witnesses and associates; I) use of a police psychic and hypnotist; and, j) press releases and flyer distribution.

These techniques have been tried and were unsuccessful, or appear unlikely to succeed if tried, and/or are too dangerous, for the following reasons:

**a. THE USE OF CONFIDENTIAL INFORMANTS:** Currently there are only two informants available to law enforcement investigators. The first was an anonymous female caller to the Cypress Police Department on August 8, 1981. This anonymous caller provided information about two subjects she thought were involved in the murder, a Mike and Ronnie Lopez. Those two subjects were contacted and through investigative techniques, were proved to not be involved in the murder of Paula Pleshe.

The other informant is the sister of the deceased, Linda Roche. While she has been able to provide historical information about the deceased, and information regarding the molestation of Lesley McKinney (A.K.A. Lesley Rickard), and was able to meet with Mary Crooker in an undercover capacity, she provides no independent confirming evidence relating to the criminal activities nor does it bring any evidence as to other suspects in this conspiracy. While this informant's information is of great value to investigators, it has proven unsuccessful.

There are no additional informants available who are known to your affiant who are able to provide detailed information regarding the conspiracy and to derive evidence against the outstanding suspects in this case.

This case centers on the conspiracy to commit a capitol murder and the hiring of individuals to commit said capitol murder. Members of a conspiracy to commit a murder are often very secretive and not likely to release information to persons whom are outside of the initial set of conspirators.

**b. INFILTRATION BY UNDERCOVER POLICE OFFICERS:** Due to the close knit structure of the conspiracy and its members, infiltration by an undercover police officer appears to be an investigative technique fraught with failure. Attempts to place an undercover police officer into a criminal

conspiracy, after the fact, especially one involving violent crimes such as murder, places the officer's safety in great peril. The likelihood that undercover officers would be able to penetrate a conspiracy of this nature is very unlikely.

**c. VISUAL SURVEILLANCE:** Due to the nature of this crime and the time that has elapsed since the commission of this crime, it is highly unlikely that through surveillance officers would obtain evidence that would be of evidentiary value. Persons engaged in a conspiracy to hire persons to commit a contract killing often are very secretive and may not meet again once the initial contact has been made. Through my training and experience, I have found that persons who have entered into a conspiracy to commit a murder may distance themselves from each other to elude the collection of evidence by law enforcement officials.

**d. USE OF MAIL COVER:** Detective Bruce of the Cypress Police Department has drafted two mail covers through the United States Postal Inspection Service. Mail has been documented arriving at both the residence of Gerald and Mary Pleshe at 1498 Shady Oak Drive in Sparks, Nevada, and at the residence of Candace Restivo at 908 Jimmie Kerr Road in Haw River, North Carolina. No incriminatory or exculpatory information has been gleaned from the mail covers.

**e. USE OF A PEN REGISTER:** The use of a Pen Register device would prove to be an inadequate technique in this particular case. It can only show that a conversation may have occurred but cannot reveal the participants and the topics discussed.

**f. GRAND JURY:** Another technique which could be employed in the investigation of a murder-for-hire type conspiracy is the initiation of grand jury proceedings. It is noted that the use of the grand jury proceeding to investigate a close-knit criminal conspiracy might alarm the principles once potential suspects are called before a grand jury. In addition, even if this investigation met existing criteria for submission to a grand jury, there is no reason to believe that any of the principles currently under investigation would cooperate with the grand jury, with or without grants of immunity. In fact, the mere initiation of a grand jury investigative proceeding would render continued investigation difficult by revealing the existence of the investigation by law enforcement to the targets of this investigation.

**g. EXAMINATION OF PHYSICAL EVIDENCE:** All evidence gathered from the murder of Paula Pleshe was first submitted in 1981, however, advancement in forensic science technology prompted investigators to resubmit the evidence periodically throughout the past eighteen (18) years. As of this date of application, your affiant and assisting investigators have submitted all physical evidence originally located at the crime scene, to include latent finger prints, palm prints, and a knife that was located near the crime scene approximately one (1) month after the murder of Paula Pleshe, to the Orange County, California, Sheriff's Crime Lab. Using the latest technology, all evidence has been processed and has not produced any suspects or leads. Print comparisons have also been done on the physical evidence from the crime scene to over twenty-five (25) persons either listed as witnesses, emergency first responders, and possible suspects, with no matches made to the physical evidence located at the crime scene. All automated finger print systems have also been searched using the finger prints found at the crime scene, and to date no matches have been made.

**h. USE OF A POLICE PSYCHIC AND HYPNOTIST:** Police psychics have proven reliable in past law enforcement cases, assisting investigators with additional leads that yet have been discovered. Two different self-proclaimed police psychics, one in 1992 and the other in 1999, have volunteered their services in an attempt to reveal any information that may help in this case. These efforts were proven to be unsuccessful.

In 1981, members of the Los Angeles, California, Police Department, Investigative Hypnosis Program, also assisted with hypnotizing two witnesses. This effort also proved unsuccessful, however one witness was able to provide letters that might have appeared in the suspect vehicle's license plate number.

**I. PRESS RELEASE AND FLYER DISTRIBUTION:** After the murder of Paula Pleshe, a great deal of resources were utilized in an attempt to locate her killer and/or killers. Several press releases, both newspaper and television, were made over the course of the investigation, as well as the distribution of brochures seeking help in solving this case. This effort also has proved to be unsuccessful.

**PERIOD OF TIME INTERCEPTION IS REQUESTED**

The facts set forth in this affidavit describe a criminal conspiracy, the object of which was the murder-for-hire and the consummated murder of another individual, namely Paula Pleshe. It is believed

that the evidence sought will be obtained on a continuing basis for several days following the first wire interception.

Therefore, pursuant to NRS 179.470(1)(d), it is requested that this investigation not automatically terminate when the sought-after evidence is acquired and reveals the manner in which the participants referred to herein, and others known and unknown, conduct their illegal business, the nature of the conspiracy involved, and the identity and places of operation of the conspirators, or for a period of thirty (30) days from the date of the Order or the date on which interceptions begin (whichever is earlier).

We would like permission to activate the intercept twenty-four (24) hours prior to our planned interviews with Gerald and Mary Pleshe, Candace Restivo and relatives to insure that the mechanical aspects of the wire are fully operational. It is essential that the wire be up and ready because the conversation will most likely be spontaneous and brief. During this period minimization will be in effect.

#### **KNOWN PREVIOUS APPLICATIONS**

No known previous applications have been made to any judge in the State or Federal Court for authorization to intercept wire electronic communications involving any of the same persons, facilities, or places specified herein.

#### **CONCLUSION**

Based upon your affiant's experience, your affiant believes that the evidence gathered by investigative means available and current investigative technologies to date, have not provided closure to this case.

Through the interception of telephone communications, detectives will be able to ascertain, and use as evidence, conversations by and among the various participants in this conspiracy. It is requested that the Court allow law enforcement officers to hook-up the monitoring, listening and recording devices to intercept the wire electronic communications of the target telephone line (775)356-1460, located at 1498 Shady Oak Drive, Sparks, Nevada. Upon completion of the wire electronic communications interception, the recordings and records related to this wire electronic communications intercept will be supplied to the Court to be maintained in compliance with the statutes and, if interceptions in fact takes place, notice to the intercepted parties will be made in compliance with Nevada law and Federal regulations.

Therefore, pursuant to NRS 179.475(2), it is requested that the Court direct Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, all public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, to furnish the Cypress, California, Police Department (hereafter referred to as "Agency") and Christopher McShane (hereafter referred to as "Case Agent") all information, facilities, and technical assistance necessary to accomplish the wire electronic communication interception unobtrusively and with a minimum of interference with the services that such carrier is providing the person whose communications are to be intercepted.

It is further requested that the Court direct Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, all public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, to conduct trap and trace (seize) on a continuous basis (day/night - 24 hours), for the period of this Order, all pulse or tone digits and call progress data for all calls being placed from or dialed to the target telephone line (775) 356-1460, including the seizure of all caller ID information.

It is further requested that the Court direct Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, all public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, to provide the Agency and Case Agent and/or his designee, information gathered by reason of this trap and trace Order at reasonable intervals while this Order is in effect, and, where possible, provide the time, date and duration of each call captured as a result of this trap and trace.

It is further requested that the Court direct Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, all public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, at the request of the Agency and Case Agent and/or his designee, to provide assistance in enabling the installation, use and monitoring, on a continuous basis (day/night - 24 hours), of a Dial Number Recorder (also to be used to intercept wire communications).

It is further requested that the Court direct Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, all public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, at the request of the Agency and Case Agent

and/or his designee, to activate the Custom Calling Service, "Caller ID" for the period of this order, on the target telephone line (775) 356-1460, to capture incoming calls that could be identified at time of interception by the Dial Number Recorder and other supporting equipment. It is further requested that the activation of said feature not appear on the target telephone bill and be billed directly to the Cypress Police Department under the designated name as indicated under the Billing Information on the Request for New Service form.

Pursuant to the NRS 179.475(2), the furnishing of such facilities or technical assistance by the Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, shall be compensated by the Cypress Police Department at prevailing rates.

It is further requested that the Court direct Nevada Bell, Pacific Bell, General Telephone, Air Touch Cellular, all public access paging companies, and any other common communications carrier, affected telephone companies and long distance carriers, NOT TO DISCLOSE to the subscriber(s) of the telephone services identified, or any other unauthorized person, the existence of this order or this investigation, unless otherwise ordered by this Court.

This matter having come before the Court pursuant to a request that an Order be issued, that the Order, Attached exhibits, the supporting affidavit, and any other supporting documentation as requested by the Court, be ordered sealed and kept in the custody of the Case Agent to be disclosed only upon a showing of good cause before a Court of competent jurisdiction.

The type of equipment which will be used and connected to the target telephone line, or sending and receiving equipment, will allow for the recording of the conversations to fully preserve the conversations between Gerald Pleshe, Mary Pleshe, and Candace Restivo, or any other persons allowed to be intercepted as it relates to the murder, which are allowed by the Court in compliance with the Nevada Revised Statute.

Therefore, based on the foregoing information, it is requested that Richard A. Gammick, the District Attorney for Washoe County, Nevada, make application to the Court on behalf of the Cypress, California, Police Department, to allow for wire

electronic communication interception by the Cypress, California, Police Department on the said target telephone line.

I declare under penalty of perjury that the foregoing is true and correct.

_____	_____	Detective
Christopher McShane	Detective Rick Garretson	
Cypress Police Department	Washoe County Sheriff's Office	

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, .

NOTARY PUBLIC

**Preemptory Challenges Additional**

CODE 2645  
Richard A. Gammick  
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Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendants.

\_\_\_\_\_ /

**OPPOSITION TO MOTION FOR ADDITIONAL  
PEREMPTORY CHALLENGES**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and DANIEL J. GRECO, Chief Deputy District Attorney, and offers its Opposition to the Motion for Additional Preemptory Challenges filed by the defendant.

This Opposition is based upon the following Points and Authorities and the pleadings and papers on file herein.

**POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

**STATEMENT OF THE FACTS**

**ARGUMENT**

NRS 175.051 provides in pertinent part:

1. If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges.

NRS 175.041 provides that:

When several defendants are tried together, they cannot sever their peremptory challenges, but must join therein.

The language of NRS 175.041 is mandatory. For the purposes of jury voir dire selection, multiple defendants must be treated as one party. Therefore, in a trial with a potential life sentence, two defendants are jointly entitled to eight peremptory challenges, the same number as the prosecution. NRS 175.041; Doyle v. State, 82 Nev. 242 (1966); White v. State, 83 Nev. 292 (1967); Young v. State, 103 Nev. 233, 235 (1987).

**CONCLUSION**

The language of NRS 175.041 and 175.051 is clear and unambiguous. The State is entitled to eight peremptory challenges. The defense is entitled to eight peremptory challenges. By the filing of the instant Motion, the defense is attempting to gain an unfair advantage over the State by giving the defense twice as many peremptory challenges as the prosecution.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Photographs Preclude or Limit Jurisdiction of the Court**

CODE  
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(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO MOTION TO PRECLUDE OR LIMIT PHOTOGRAPHS**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK,  
District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby  
submits this (MOTION TITLE). The Opposition is pursuant to Green v. State, 113 Nev. 157 (1997), Paine  
v. State, 110 Nev. 609 (1994), Dearman v. State, 93 Nev. 364 (1977), NRS 48.015 through 48.035, the  
attached POINTS AND AUTHORITIES incorporated herein by this reference, and any oral argument the  
Court requires..

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

The defendant's motion is not on point when it requests that no photographic evidence be admitted at trial. In Green v. State, 113 Nev. 157 (1997), the Nevada Supreme Court states, "The admissibility of photographs is within the sound discretion of the trial court. . . . It is within the court's discretion to admit photographs where the probative value outweighs any prejudicial effect the photographs might have on the jury." Id., 113 Nev. at 166 (citations omitted). See NRS 48.015 through 48.035.

The Court has also held that color photographs are admissible "to illustrate and explain the circumstances of the crime and the nature of the victim's wounds, both of which are relevant to a determination of the degree of crime committed." Dearman v. State, 93 Nev. 364, 370 (1977).

The State also reserves the right to present photographic evidence during the penalty phase of the trial that would otherwise be inadmissible during the guilty phase. In Paine v. State, 110 Nev. 609, 617 (1994), the Nevada Supreme Court states, "It is well settled that photographs depicting the scene of a crime are admissible during penalty hearings. Riggins v. State, 107 Nev. 178, 183, 808 P.2d 535, 538-39 (1991), *rev'd on other grounds*, 504 U.S. 124, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). See also NRS 175.552(3)(authorizing the admission of otherwise inadmissible evidence in penalty hearings).

The State will comply with all case law and statutory law if it does offer photographs during the guilt or penalty phases of trial. Further, the State will provide defense and the Court with photographs it intends to use at any stage of trial so that the Court may make its determination as to the admissibility of the photographs.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Photographs Autopsy Admissibility Murder Victim**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

RESPONSE TO DEFENDANT’S MOTION IN LIMINE TO EXCLUDE  
PHOTOGRAPHS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

The defendant contests the admissibility of photographs of \_\_\_\_\_, the victim, at trial. The Nevada Supreme Court has been very consistent in the latitude it has allowed district court judges in admitting photographs. In 1968, the Court stated in Wallace v State, 84 Nev. 603, 606 (1968):

The colored photograph of the nude decedent was taken at the morgue. The doctor used that photograph to explain to the jury the various wounds and their relation to the cause of death. It is not suggested that the photograph was inaccurate. Since the purpose of trial is to ascertain and disclose the truth we will not subvert that purpose and declare relevant photographic evidence inadmissible simply because it damages the defense. (citations omitted).

"Color photographs of a victim used by a doctor to explain the cause of death to a jury are properly admissible because they aid in the ascertainment of truth." Allen v. State, 91 Nev. 78, 82 (1975).

In Theriault v. State, 92 Nev. 185, 193 (1976), the defendant contested the trial court's admittance of some photographs of his murder victims, arguing that they were so gruesome as to be prejudicial. The court stated:

The photos are gruesome. They do, however, depict the scene of the crime. Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime [citation], or when utilized to show the cause of death [citation], and when it reflects the severity of wounds and the manner of their infliction [citation]. In the instant case, the district judge found that the probative value of the photographic evidence outweighed the \_\_\_\_\_ prejudicial effect, if any, and properly received the photos in evidence.

Id. See, Libby v. State, 109 Nev. 905, 910-11 (1993); Browne v. State, 113 Nev. 305, 314 (1997).

Most recently, the Nevada Supreme Court had the following to say about the admission of a family photograph and autopsy photographs depicting a murder victim:

The admissibility of photographs is within the sound discretion of the district court. [citation] It is within the district court's discretion to exclude

photographs when their prejudicial effect substantially outweighs their probative value. [citation] We conclude that the family photograph was relevant on the issue of Berndt's identity and accurately depicted her six months prior to the killing; this photograph also provided a comparison with her appearance in the autopsy photographs. Accordingly, we conclude that the probative value of the family photograph outweighed its prejudicial effect thus the district court did not abuse its discretion by admitting it. With respect to the autopsy photographs, this court recently reiterated its position that even gruesome photographs are admissible if they aid in ascertaining the truth, and that "'despite gruesomeness, photographic evidence has been held admissible when...utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction.'" [citations] Here, the autopsy photographs reveal the extent and severity of Berndt's injuries. In light of the considerable discretion afforded the trial court in deciding whether to admit photographic evidence and this court's pronouncements in Browne, we conclude that the district court did not abuse its discretion in admitting the autopsy photographs.

Castillo v. State, 114 Nev.Adv.Op. 33 (April 2, 1998).

DATED this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By

Deputy District Attorney

**Photographs Admissibility II**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## POINTS AND AUTHORITIES

### I. STATEMENT OF THE CASE

### II. STATEMENT OF THE FACTS

### III. ARGUMENT

#### A. ADMISSION OF PHOTOGRAPHS GENERALLY

The standard of what photographic evidence is to be admitted is within the "sound discretion" of the trial court. Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 60 (1997). The ensuing analysis is whether or not the probative value of the photographs is substantially outweighed by any prejudicial effect. Browne v. State, 113 Nev. 305, 313, 933 P.2d 187, 192 (1997); NRS 48.035(1). To this end, the State agrees that photographic evidence violating this high standard is inadmissible. As such, the State requests that this court conduct a hearing to examine photographs proposed by the State for use at trial for their potential prejudicial effect and hear testimony supporting their probative value.

#### B. ADMISSION OF GRUESOME PHOTOGRAPHS

Our court has "reiterated its position that even gruesome photographs are admissible if they aid in ascertaining the truth, and that " 'despite gruesomeness, photographic evidence has been held admissible when ... utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction.' " Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998), citing Browne, supra. The core question is whether or not the proposed gruesome photographs "assist the medical examiner in explaining the cause and circumstances of death." Thomas v. State, 114 Nev. 1127, \_\_\_, 967 P.2d 1111, 1121 (1998).

An uncontested cause of death by the defendant is not relevant to the trial court's weighing analysis. An "...argument that the autopsy photographs could not be utilized to show the cause of death where he did not dispute it is without merit. By pleading not guilty, a defendant puts all elements of the offense at issue." Doyle v. State, 116 Nev. Adv. Op. 15, 14, P.2d \_\_\_, \_\_\_ (2/3/2000), citing Sonner v. State, 112 Nev. 1328, 1338-39, 930 P.2d 707, 714 (1996).

#### C. ADMISSIBILITY OF PHOTOGRAPHIC ENLARGEMENTS

The State opposes restrictions upon the enlargement of admissible photographic evidence. In contrast to the sole case cited by the defendant where a small-size photograph was utilized by the trial court,<sup>9</sup> our court has recently and specifically upheld the use of enlargement of gruesome photographs. "We are thus persuaded that where autopsy photographs are admissible, it is permissible to project the same images on to a screen as a means of assisting a medical examiner in explaining his or her findings relevant to the issues before a jury." Doyle, supra, Nev. at 15.<sup>10</sup> The foundational question on the admissibility of enlargements appears to be whether or not they both explain and illustrate the perspective of the percipient and expert witness testifying before a jury. Id., Nev. at 15.

The State proposes the use of a projection system commonly used in the courtroom where a photograph is replicated by the projection system and the image is displayed upon television screens available to the court, counsel and jury.<sup>11</sup> At the proposed hearing on proper photographic evidence, the State proposes offering a select group of photographs on the system supplemented by the testimony of the pathologist. By this protocol, the court and counsel can contemporaneously view the photographs and the court can then hear argument and consider the photographs proposed by the State for relevance and their probative value as illuminated by the testimony of the pathologist in a single setting.

#### CONCLUSION

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

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<sup>9</sup>See defendant's Motion in Limine RE: Photographs, pg. 4, citing Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

<sup>10</sup>For a general discussion of Nevada and out-of-state authority on the use of projection systems, see Doyle, supra, Nev. at 14.

<sup>11</sup>The projection system device is known as "The Communicator" manufactured by Doar.

**Photographs Use of**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK

District Attorney

Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)

Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

Defendant moves this court to preclude or limit the use of photographs. However photographic evidence is generally liberally admitted so long as it sheds light upon some material inquiry. Nails v. State, 90 Nev. 124, 125 (1974); Alsup v. State, 87 Nev. 500, 502 (1971)

Since the purpose of trial is to ascertain and disclose the truth we should not declare inadmissible evidence which is relevant to that purpose and the issues simply because it damages the defense.

Wallace v. State, 84 Nev. 603, 606 (1968) ; Langley v. State, 84 Nev. 295, 297 (1968)

A witness may describe what he saw and illustrate his testimony with photographs. State v. Young, 661 P.2d 1138, 1142 (Ariz. Ct. of App. 1982). A glimpse of a photograph may give a more definite and correct idea of the scene than the most minute and detailed testimony. State v. Gambetta, 66 Nev. 317, 327

(1949)

As the Supreme Court of California has recently stated  
in People V. Raley, 830 P.2d 712, 729 (1992)

Contrary to defendant's claim, such evidence is not cumulative:  
'the prosecution is not  
obliged to provide these details solely from the testimony of live  
witnesses and the jury  
was entitled to see how the physical details of the scene and bodies  
supported the  
prosecution theory...' (Citations omitted).

In order to balance the probative value and possible  
prejudicial effect, if any, this court must know much more about  
the facts and circumstances surrounding this murder and must  
certainly view the proffered photographs. As such, plaintiff  
simply requests a hearing on this matter at which time an offer  
of proof can be made.

However, to rebut defendant's contentions in this  
matter, plaintiff submits that expert testimony will be proffered regarding the size and  
shape of the stab wounds to the victim's neck as they compare to the alleged murder  
weapon. Autopsy

photographs will be necessary and will assist the jury in their  
determination as to whether these wounds were inflicted by the  
alleged murder weapon.

Further, as brought out extensively in the preliminary  
hearing, the victim had wounds to the head consistent with  
someone striking his head against some rocks at the scene of  
the murder. Plaintiff again submits that photographs will be  
necessary to accurately portray the size and position of such  
head trauma to the victim in order to correspond with the

witnesses' testimony and lend credibility to same.

Dated this \_\_\_\_\_ day of

.  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By

Deputy District Attorney

**Plea Withdrawal Defendant's Burden**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

#### **REQUIREMENT THAT A DEFENDANT HAS SOME BURDEN TO ARTICULATE THE BASIS FOR SUPPRESSION OF A STATEMENT**

The precise question to be briefed before this Court is whether a criminal defendant has some slight burden to specifically allege the claimed defect that renders the defendant's statement to police inadmissible at trial. As previously indicated in Court, the State certainly understands the law in the State of Nevada regarding the State's burden of showing a confession/admission to be voluntarily given, however, that burden can only properly be triggered when a specific allegation has been made that would give proper notice to the State as to what police conduct was inappropriate and/or why the defendant's state of mind would cause the statement to be involuntary.

Title 4 of the Nevada Revised Statutes deals generally with witnesses and, more importantly, the rules of evidence. NRS 47.030 sets forth the purposes of Title 4 of the Nevada Revised Statutes. It states in its entirety: The purposes of this "Title" are to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

In the context of a habeas corpus proceeding, the Fifth Circuit Court of Appeals has held: Before a prisoner is entitled to a hearing on the voluntariness of his confession the petitioner must 'show that his version of the events, if true, would require the conclusion that his confession was involuntary.' Martinez v. Estelle, 612 F.2d 173, 180 (5th Cir. 1980) citing to Procnier v. Atchley, 400 U.S. 446, 451, 91 S.Ct. 485, 488 (1971). See also United State v. Davidson, 768 F.2d 1266 (11th Cir. 1985). The defendant has not presented any competing version of the facts either at his trial or on appeal, much less any facts from which involuntariness of the confession could be inferred.

United States v. Espinoza-Seanez, 862 F.2d 526, 536 (5th Cir. 1988) (emphasis added).

The Nevada Supreme Court is in accord. Specifically, in Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), our Court held that "bare" or "naked" claims for relief that are unsupported by specific factual allegations would not be the basis for appellate relief, to include, an otherwise undeniable right to an evidentiary hearing.

Additionally, a compelling analogy can be drawn in reviewing case law regarding a Franks hearing, a hearing designed to traverse the imperfections of a search warrant. Among the requirements to establish a sufficient motion for a Franks hearing is that the defendant must allege specifically which portion of the warrant affidavit are claimed to be false and/or misleading. See United States v. DiCesari, 765 F.2d 890, 894 (9th Cir. 1985). See also Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990); Garrettson v. State, 104 Nev. \_\_\_\_\_, 967 P.2d 428 (1998).

As the aforementioned authority clearly points out, the evidentiary burden of the State is not in dispute. More precisely, it is whether the State is put on notice of the alleged defect so that it may properly meet its burden. As this case unequivocally points out, the precise nature of the alleged defect is not self-evident. Further, the State is at an extreme disadvantage in attempting to meet its burden when it has no notice as to what the alleged defect is. Here, the defendant has apparently alleged that he was so grossly intoxicated he could not voluntarily and intelligently waive his Miranda rights. That allegation could potentially involve a separate and distinct assessment on behalf of the State on how to meet its evidentiary burden at a suppression hearing. The burden on the defendant to allege with specificity is slight, if it's a burden at all. The State is incapable of assessing those defects that may exist in a defendant's state of mind (i.e. drunkenness, use of controlled substance). Further, the State is incapable of assessing whether or not someone's alcohol or drug consumption, in and of itself, or combined with other factors, rendered the defendant incapable of intelligently waiving one's Miranda rights. Obviously, the State would be able to ascertain whether the Miranda warnings were given in a case and thus, could infer that was a defect without the specific allegation being made in the defendant's motion. NRS 47.030 speaks of evidentiary issues that are to "secure fairness in administration, elimination of unjustifiable expense and delay." Failure of the defendant of having the minimal burden of stating what renders a defendant's

statements inadmissible directly focuses and properly gives notice to the State to meet its evidentiary burden.

#### **NECESSITY OF LIVE TESTIMONY AT A SUPPRESSION HEARING**

The second issue directed by this Court to be briefed is whether a criminal defendant who seeks suppression of his statements/admissions to police, mandates a evidentiary hearing which can only be satisfied by the presentation of "live" testimony.

NRS 47.090 refers to "hearings" on the admissibility of confessions or statements by a criminal defendant. No statutory provision requires the State to satisfy its burden by calling witnesses. The burden of proving a waiver of one's Miranda rights is that of a preponderance of evidence. Koza v. State, 102 Nev. 181, 188, 718 P.2d 671, 676 (1986).<sup>12</sup> The State is unable to find any authority that directs and/or mandates that the State can only meet its evidentiary burden by calling live witnesses. The only authority that would address such issue as to whether or not the evidence is otherwise competent.

#### **CONCLUSION**

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<sup>12</sup> Cited affirmatively in the defendant's initial Motion to Suppress p.4, l.22.

**Plea Withdrawal Must Show Manifest Injustice**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No.CR

,

Dept.No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

**THE DEFENDANTS' PLEAS WERE ENTERED KNOWINGLY AND VOLUNTARILY AND THE COURT IS WITHOUT JURISDICTION TO ALLOW THE PLEAS TO BE WITHDRAWN ABSENT A SHOWING OF MANIFEST INJUSTICE TO THE DEFENDANTS.**

A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel. Wingfield v. State, 91 Nev. 336, 337 (1975). Upon a motion for withdrawal, the defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Wynn v. State, 96 Nev. 673, 675-76 (1980).

"Except as otherwise provided in this section, a motion to withdraw a plea of...nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." NRS 176.165. "Following sentencing, a guilty plea may be set aside only to correct a manifest injustice." Baal, supra, at p. 72. "The defendant begins to serve a sentence when a judgment of conviction is signed by the judge and entered by the clerk." Staley v. State, 106 Nev. 75, 79 (1990).

**The defendants' pleas were knowing, intelligent, and voluntary as evidenced by the court's thorough canvass.**

"A guilty plea will be considered properly accepted if the trial court sufficiently canvassed the defendant to determine whether the defendant knowingly and intelligently entered into the plea." Baal v. State, 106 Nev. 69, 72 (1990) (citations omitted). The court shall not accept an oral plea of nolo contendere "without first addressing the defendant personally and determining that the plea is made voluntarily with the understanding of the nature of the charge and the consequences of the plea." NRS

174.035. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citations omitted).

C. The defendants' conclusory claims of ineffective assistance of counsel fail to demonstrate any deficient representation has been made. manifest injustice in that no showing of

"A defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth...' by the United States Supreme Court. Hill, supra, at pp. 56-57 (citations omitted).

Counsel's advice must fall within "the range of competence demanded of attorneys in criminal cases." Id.

However, the Court cautioned:

Judicial scrutiny of counsel's performance must be **highly deferential**. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence...A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct **from counsel's perspective at the time**. Because of the difficulties in making the evaluation, **a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance**...There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way...Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel 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...**[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.**

Strickland v. Washington, 466 U.S. 668, 689-90 (1984) (emphasis added).

In asserting ineffective assistance of counsel, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Hill, supra, at p. 57. The defendant

must also show prejudice, in that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, supra, at p. 59. See also, Davis v. State, 107 Nev. 600, 602 (1991); Kirksey v. State, 112 Nev. 980, 987-88 (1996). "A court may consider the [foregoing] two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Id.

Allegations made in support of the motion "are belied or repelled by the record," specifically the plea canvass. Hargrove v. State, 100 Nev. 498, 503 (1984).

Supreme Court adopted the analysis of a circuit court which "concluded that an attorney's performance was deficient where he relied solely on the prosecution's file, medical reports, and interviews with the defendant **where the defendant consistently maintained his innocence and denied statements made to police.**" Kirksey, supra, at p. 993 (citations omitted and emphasis added). However, the "court specifically distinguished that case from one wherein the defendant has **not** provided the attorney with any information that would cast doubt on the events as portrayed in the prosecutor's files." Id. (emphasis added).

"The question of an accused's guilt or innocence is generally not at issue in a motion to withdraw a guilty plea." Hargrove v. State, 100 Nev. 498, 503 (1984).

Furthermore, both "Manifest injustice within the intendment of NRS 176.165 does not occur from the entry of a guilty plea to a sustainable charge." State v. Adams, 94 Nev. 503, 505-06 (1978). Following the holdings of Adams and Hargrove, the defendants have failed to allege or show that their pleas resulted in manifest injustice.

The second prong of Hill and Strickland requires the defendants to show prejudice. Furthermore, "bare" or "naked" allegations of prejudice unsupported by specific, credible factual assertions are insufficient to justify relief. See, Hargrove, supra, at p. 502.

THE ALTERNATIVE MOTION FOR RE-SENTENCING MUST BE DENIED BASED ON THE DEFENDANTS' FAILURE TO SHOW THE SENTENCE WAS ILLEGAL OR WAS BASED ON A MATERIAL FALSE ASSUMPTION OF FACT WHICH WORKED TO THEIR EXTREME DETRIMENT.

"[A] sentencing court may under certain circumstances entertain a motion to vacate or modify its orders and judgments." State v. District Court, 100 Nev. 90, 95 (1984). A court has "jurisdiction to modify sentence only if (1) the...court actually sentenced [the defendants] based on an materially false assumption of fact that worked to [the defendants'] extreme detriment, and (2) the particular mistake at issue was of the type that would rise to the level of a violation of due process." Passanisi v. State, 108 Nev. 318, 323 (1992). "It must be noted, however, that not every mistake or error which occurs during sentencing gives rise to a due process violation." District Court, supra, at p. 97. "[A] due process violation arises only when the errors result in 'materially untrue' assumptions about a defendant's record." Id. See also, Edwards v. State, 112 Nev. 704, 707 (1996). "We emphasize that a motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment. "Motions to correct illegal sentences address only the facial legality of a sentence." Edwards v. State, 112 Nev. 704, 708 (1996).

### **CONCLUSION**

The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as a specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution...A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement...might be factually supported.

Tollett v. Henderson, 411 U.S. 258, 267-68 (1973).

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By

Deputy District Attorney

**Plea Bargain Specific Performance Detrimental Reliance**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO DEFENDANT'S MOTION SEEKING SPECIFIC  
PERFORMANCE OF PLEA BARGAIN**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_,  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)

Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

**THE COURT IS WITHOUT AUTHORITY TO ENFORCE  
AN AGREEMENT THAT DOES NOT EXIST**

The instant motion concedes, as it must, the defendant has not entered her guilty plea and the Court has not accepted same.

The Nevada Supreme Court in State v. Crockett, 110 Nev. 838 (1994) addressed the issue as to whether a prosecutor can withdraw from a plea bargain when the Court has not yet accepted the defendant's guilty plea. Citing from the United States Supreme Court case of Mabry v. Johnson, 467 U.S. 504, 104 S.Ct.Rpt. 2543 (1984) unanimous court held:

A plea bargain standing alone is without constitutional significance; in

Crockett at 842.

Citing affirmatively to the First Circuit Court of Appeals the Crockett court went on to hold:

Pursuant to general contract principles (citations omitted) we hold that a plea agreement of this type is no more than an offer by the government: If the defendant pleads guilty and if that plea is accepted by the court, then the government will perform as stipulated in the agreement. Until performance took place by [the defendant], the government was free to withdraw its offer. United States v. Papaleo, 853 F.2d 16, 20 (1st Cir. 1988).

The Crockett adopted the rule that no plea bargain exists until acceptance by the court by citing the language of United States v. Savage, 978 F.2d 1136, 1138 (9th Cir. 1992), cert denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 113 S.Ct. 1613 (1993) which held:

The realization of whatever expectations the prosecutor and defendant have as a result of their

bargain depends entirely upon the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves the plea. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party would be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.

See also, United States v. Washman, 66 F.3d 210, 212 (9th Cir. 1995) (defendant and government not bound by plea agreement until accepted by the court).

The fact that the defendant signed a plea memorandum agreement endorsed by the Deputy District Attorney handling the case is of no moment. As stated previously, the plea bargain, in order to be enforceable, must be accepted by this Court. In Crockett the district attorney's office had entered into negotiations with the defendant prior to the preliminary hearing. The defendant sought to enforce the plea negotiations at the justice court level, and was successful until the Supreme Court reversed the decision on appeal.

**DETRIMENTAL RELIANCE IS NECESSARY TO ENFORCE PLEA  
NEGOTIATIONS WHICH HAVE NOT BEEN ACCEPTED BY THE COURT**

The Nevada Supreme Court in Crockett held that "detrimental reliance" can make a plea bargain binding. The example cited in Crockett is that the defendant supply the prosecution with information or another benefit that would benefit the prosecution. The Crockett court held:

Where respondents have not yet pleaded guilty or otherwise prejudice their position by relying upon the prosecution's offer during the period it was in existence. Further, there has been no showing that the state has gained some unfair advantage over [the defendant] as a result of their reliance on the plea bargain offer. In short, [the defendant is] in the same position as they were after the initial charges were filed -- they are free to exercise the right to a trial.  
State v. Crockett, 110 Nev. at 844.

In United States v. Traynoff, 53 F.3d 168 (7th Cir. 1995) the defendant (Traynoff) pled guilty and was placed on probation, a condition of which, was from him to refrain from committing any

state or federal felony. Traynoff was subsequently indicted on state felony charges. At a probation revocation hearing, the federal prosecutor indicated that he would be dismissing the revocation hearing. Unfortunately for Traynoff, a proposed order had been submitted to the court but never signed. The federal prosecutors subsequently found out that the court had not signed the dismissal order and re-instituted its revocation hearing. The defendant unsuccessfully argued that the government was required to fulfill its promise.

The Third Circuit Court of Appeals is also in accord with the above-referenced authorities in United States v. Gonzalez, 918 F.2d 1129, 1133 (3rd Cir. 1990) where it stated "[i]t is axiomatic that a plea agreement is neither binding nor enforceable until it is accepted in open court...[W]e pointed out that the fundamental right to trial by jury 'would be belittled if we held it to be an insufficient "remedy" or a result for a defendant who has not been induced to rely on the plea to his detriment.'" The court went on to state "there is no rational basis for holding, in essence, that a trial is sufficient for the defendant who has not been offered a plea and insufficient for the one who has." Gonzalez at 1134.

Several cases have addressed what does constitute and does not constitute "detrimental reliance." United States v. Streebing, 987 F.2d 368, 373 (6th Cir. 1993) (interview of defendant for substantial assistance not detrimental reliance); People v. Frazier, 895 P.2d 1077, 1079 (Colo.App. 1994) (continued incarceration not detrimental reliance); United States v. Molina-Iguado, 894 F.2d 1452, 1455-56 (5th Cir. 1990) (government gained no unfair advantage over the defendant); United States v. Kettering, 861 F.2d 675, 678-79 (11th Cir. 1988) (interview with detectives regarding drug distribution ring not detrimental reliance as defendant's statements were inadmissible at trial); Stokes v. Armontrout, 851 F.2d 1085, 1091 (8th Cir. 1988) (court refused to enforce plea bargain prior to acceptance by court); United States v. Coon, 805 F.2d 822, 825 (8th Cir. 1986) (detrimental reliance is burden of the defendant and must show that they could no longer get a fair trial).

In addition, several other states and federal courts have found other types of claimed inconvenience not to be "detrimental reliance." State v. Wheeler, 631 P.2d 376, 380 (Wash. 1981) ("psychological" reliance on offer insufficient); People v. Romero, 712 P.2d 1081, 1083 (Colo.App. 1985) (hypnotically induced statement regarding involvement was detrimental reliance); State v. Bogart, 788 P.2d

14, 16 (Wash.App. 1980) (no showing that defendant was unable to get a fair trial as a result of prosecutor's action).

When a defendant waived his privilege against self-incrimination, submitted to several interviews with police which yielded significant information, waived right to counsel and to a speedy trial and testified at his father's preliminary hearing fell within the definition of "detrimental reliance." People v. McCormick, 839 P.2d 474, 479 (Colo.App. 1992).

In another case the defense argued that plea offers must be specifically performed as to promote judicial efficiency in administration of justice. The court rejected the argument stating, "[w]e disagree that the certainty gained in forcing prosecutors to abide by their initial offers will meet those goals. Instead, prosecutors are likely to refrain from making plea offers until the last possible moment, when they are fully prepared for trial and fully aware of all variables. This would greatly reduce the advantages of swift administration of justice and efficiency for all parties that make plea bargains desirable in the first place." State v. Bourland, 862 P.2d 457, 459 (N.M.App. 1993).

**THE AUTHORITIES CITED IN THE INSTANT MOTION ARE  
IRRELEVANT AND INAPPLICABLE TO THE FACTS AND CASE AT BAR**

Stoner v. California, 376 U.S. 483, 484, S.Ct.Rpt. 889 (1964) fails to address any factual scenario as exists in this case. Citation to Stoner as authority that one should not strain applications of the law when dealing with constitutional rights is misplaced. As previously indicated, the United States Supreme Court and the Nevada Supreme Court have addressed the law regarding breaches of plea bargains prior to the court's acceptance of same. There is no straining of applicable law.

In Brewer v. Williams, 430 U.S. 387, 401, n.8, 97 S.Ct.Rpt. 1232, 1240 (1977), the Supreme Court was addressing Fifth and Sixth Amendment principles and had nothing to do with a "plea agreement." In addition, the motion incorrectly cites to the Supreme Court Reporter for the Brewer case.

Therefore, as several of the authorities relied on by the defense in its motion, "detrimental reliance" must be claimed and proven by the moving party. Detrimental reliance is not even claimed in the motion, let alone proved.

**CONCLUSION**

Both the United States Supreme Court and Nevada Supreme Court have spoken clearly as to the status of the law in the instant case that faces the defendant. Specifically, absent the defendant entering a plea, and the appropriate Court accepting said plea, no enforceable plea bargain exists except upon a showing of "detrimental reliance." That term, as defined by several courts, is determined to be a factual change in the defendant's position so that they would be unable to obtain a fair trial. In a compelling statement the United States Supreme Court addressed the argument that is currently proposed by defense counsel, "it is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." Weatherford v. Bursey, 429 U.S. 545, 561, 97 S.Ct.Rpt. 837, 846 (1977).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

**Polygraph Admissibility**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

Defendant has attacked the "per se" rule of inadmissibility of polygraph examination results. Various Courts have adhered to this approach and overall view of polygraph examinations. See e.g., U.S. v. Brevard, 739 F.2d 180 (4th Cir.

1984); U.S. v. Clark, 598 F.2d 994 (5th Cir., 1979); U.S. v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974).

The Eighth Circuit, Nevada and a significant number of other states have utilized a slightly more liberal approach which permits polygraph results only if all parties have stipulated to admissibility and certain other conditions are met. The Supreme Court of Nevada made this abundantly clear on numerous occasions. The rule in Nevada is that, "in the absence of such a stipulation, polygraph evidence is inadmissible." Buschauer v. State, 106 Nev., 890, 892, 804 P.2d 1046 (1990); Aguilar v. State, 98 Nev., 18, 21, 639 P.2d 533 (1982).

The Nevada High Court has suggested absolutely no desire to modify its position any further from the traditional "per se" rule. As stated in Corbett v. State, 94 Nev., 643, 584 P.2d 704 (1978), at p. 646:

Still, despite recognition of the technique's potential accuracy, significant policy considerations militate against a general rule admitting results of polygraph tests which are performed without the concurrence of all parties. Foremost of these are fairness and judicial efficiency. Inherent in the polygraph process are numerous variables which, if not properly monitored, can greatly reduce the reliability of the test results. It would be necessary to commit a very substantial amount of judicial time to evaluating foundation evidence, as well as to devising and enforcing court-imposed controls over the critical variables, in order to insure reliability under a rule admitting polygraph results generally. See also, Dominguez v. State, 112 Nev. 683 (1996).

Defendant suggests that this Honorable Court refuse to follow the clear directives of Nevada's Supreme Court. Polygraph results simply are not admissible in this State and the clear majority of jurisdictions because their reliability is insufficient under evidentiary standards. See Santillanes v. State, 102 Nev. 48, 50, 714 P.2d 184 (1986); Corbett v. State, *supra*. The Ninth Circuit Court of Appeals has recently repeated its disfavor of polygraph evidence in U.S. v. Miller, 874 F.2d 1255, 1261 (1989).

Although the Ninth Circuit takes a slightly more liberal approach than Nevada's Supreme Court (contrast U.S. v. Bowen, 857 F.2d 1337 (1988) and Santillanes v. State, supra.) it is clear that the Ninth Circuit would not and has not adopted the approach taken by defendant Causey. In refusing to admit polygraph results and citing Brown v. Darcy, 783 F.2d 1389 (9th Cir. 1986), the Court in U.S. v. Miller, supra, stated:

We concluded that such a holding was consistent with our uniformly 'inhospitable view' towards the admission of unstipulated polygraph evidence. Polygraph evidence has an 'overwhelming potential for prejudice' given its questionable reliability and its 'misleading appearance of accuracy.' (Citations omitted).

To admit polygraph results for any reason absent a stipulation, creates substantial prejudice by giving undue reliability to the test results. Plaintiff will stipulate that Irvin Simone lied to police extensively during his interviews. Defendant does not need a polygraph result to make this point.

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Possession Actual and Constructive**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

**ACTUAL AND CONSTRUCTIVE POSSESSION**

"Possession may be actual or constructive." Glispey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1973). A person has constructive possession of a controlled substance only if the person maintains control or a right to control the contraband." Sheriff v. Shade, 109 Nev. 826, 858 P.2d 840 (1993). In narcotics cases, "possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [his] dominion and control." Palmer v. State, 112 Nev. 763, 920 P.2d 112 (1996), citing Shade, supra, Nev. at 830, P.2d at 842.<sup>13</sup>

**III. CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

---

<sup>13</sup>Exclusivity is not necessary however to support a conviction against a sole defendant. Two or more persons may have joint possession of a narcotic if jointly and knowingly they have its dominion and control Maskaly v. State, 85 Nev. 111, 450 P.2d 790 (1969), citing Doyle v. State, 82 Nev. 242, 415 P.2d 323 (1966).

**Possession Constructive**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

**DEFENDANT HAD POSSESSION OF THE CONTROLLED SUBSTANCE**

A defendant has constructive possession of contraband, "only if she [he] maintains control or a right to control the contraband. Glispey v. Sheriff, 89 Nev. 221, 223, 510 P.2d 623 (1973).

"Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [his] dominion and control." Sheriff v. Shade, (1993) 109 Nev. 826, 830. "In order to hold one for narcotic possession, it is necessary to show dominion and control over the substance ... and knowledge that it is of narcotic character . . . These elements may be show by direct evidence or by circumstantial evidence and reasonably drawn inferences." Id at 830 citing Fairman v. Warden (1967) 83 Nev. 332.

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Preliminary Hearing Quantum of Evidence to Bind Over**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

IN THE MATTER OF THE APPLICATION

OF

FOR

Case No. CR

A WRIT OF HABEAS CORPUS.

Dept. No.

\_\_\_\_\_/ **POINTS AND AUTHORITIES IN OPPOSITION TO  
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, by and through \_\_\_\_\_, Deputy District Attorney of Washoe County, Nevada, and moves the above-entitled Court to enter an order denying the Defendant's petition for Writ of Habeas Corpus.

**STATEMENT OF CASE**

**ARGUMENT**

**I**

**QUANTUM OF EVIDENCE TO BIND OVER**

The defendant may be bound over for trial if the evidence adduced at the preliminary hearing is sufficient to establish probable cause to believe that a crime was committed and that the defendant committed it. Theford v. Sheriff, 86 Nev. 741 (1970); State v. von Bricken, 86 Nev. 769 (1970); Sheriff,

Clark County v. Lyons, 96 Nev. 298 (1980). See also NRS 171.206 (degree of evidence to warrant the magistrate to hold the defendant to answer in the District Court).

The finding of probable cause may be based on slight, even marginal evidence because it does not involve a determination of the guilt of or innocence of an accused. Sheriff v. Crockett, 102 Nev. 359 (1986); Sheriff v. Hodes, 96 Nev. 184 (1980); Kinsey v. Sheriff, 87 Nev. 361.

This Court should not now be concerned with the prospect that the evidence presently in the record may, by itself, be insufficient to sustain conviction. Miller v. Sheriff, 95 Nev. 255 (1979); McDonald v. Sheriff, 89 Nev. 326 (1973). Accordingly, the State need not produce the quantum of proof required to establish the guilt of the accused beyond a reasonable doubt. Kinsey v. Sheriff, *supra*.

It is not the function of the Supreme Court, or of the magistrate at the preliminary hearing, or of the District Court upon the habeas corpus proceeding to pass upon the sufficiency of the evidence to justify conviction. Lamb v. Holsten, 85 Nev. 566 (1969) affirming Beasley v. Lamb, 79 Nev. 78 (1963). To commit a defendant for trial, the State is not required to negate all inferences but only to present enough evidence as to support a reasonable inference that the accused committed the offence. Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966)

### **CONCLUSION**

A preliminary examination is not a substitute for a trial. As the Court in Marcum v. Sheriff, Clark County, 85 Nev. 175 (1969) states with regard to a preliminary examination:

Its purpose is to determine whether a public offense has been committed and whether there is sufficient cause to believe that the accused committed it. The State must offer some competent evidence on these points to convince the magistrate that a trial should be held. The issue of innocence or guilt is not before the magistrate. That function is constitutionally placed elsewhere. The full and complete exploration of all of the facts of the case is reserved for the trial and is not the function of the preliminary examination.

The State respectfully submits that this Court can draw any and all reasonable inferences from the facts adduced at the preliminary examination. The State submits that probable cause was established based on all the facts presented before the magistrate.

Based upon the foregoing, it is respectfully requested that this Court enter an Order denying defendant's Petition for Writ a Habeas Corpus.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney

By \_\_\_\_\_  
Deputy District Attorney

**Presumptions – Sanborn Motion**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

OPPOSITION TO MOTION FOR SANBORN INSTRUCTION

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and JOHN W. HELZER, Assistant District Attorney, to submit this "Opposition To Motion For Sanborn Instruction." The State's opposition is set forth in the accompanying Discussion.

**DISCUSSION**

In further support that the requests of the defendant are unfocused and premature, the State would refer to the authority cited by counsel for the defendant. This authority focuses almost exclusively on statutory presumptions and the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991).

The consideration of instructing a jury on a presumption is an involved process and should occur only after the evidence has been fully developed. Any request that a presumption be set forth in an instruction must be specific. Additionally, that request will necessarily involve an in-depth analysis

by the Court. In support that this process must be specific and requires an in-depth analysis, are NRS 47.180 (Presumptions generally: Effect; direct evidence.), NRS 47.190 (Determination of evidence of basic facts.), NRS 47.200 (Determination on evidence of presumed fact: Where basic facts established.), NRS 47.210 (Determination on evidence of presumed fact: Where basic facts lacking.), NRS 47.220 (Determination on evidence of presumed fact: Where basic facts doubtful.), NRS 47.230 (Presumptions against accused in criminal actions). Juries must not be instructed in the general overly broad manner that defense requests. The defendant must make a request that is specific, and the Court must make findings as to that specific request. In addition to the statutes previously referred to, the Sanborn decision relied on by the defendant supports the requirement of specificity.

In Sanborn the Court specifically found that the State's mishandling of a gun resulted in a loss of evidence of blood and fingerprints. With the loss of this evidence, the defendant's claim of self-defense rested almost exclusively on his own testimony. The Court found that if the defendant's testimony was true, the evidence of the blood and fingerprints on the weapon could have been critical corroboration of the claim of self-defense. The Court further found that the State's case was enhanced by the absence of any blood or fingerprint evidence. After these specific findings, the Court held that the State could not benefit from its failure to preserve this evidence. It was after these very specific findings were made that the Court proceeded to indicate what instruction would be given.

Sanborn does not support the general unspecified request now made by the defendant. The proposed instruction was very narrowly drafted and was only ordered after there was a specific showing of a critical need for the evidence by the defendant and a finding that the State benefitted from its actions resulting in a loss of that evidence. Sanborn did not result in the creation of generally accepted instruction.

For the reasons set forth above, the State would respectfully submit that the Court delay any decision concerning the requested instruction until after the presentation of evidence in the case is concluded. The State would further request that prior to making any determination about the requested instruction that the process set forth in Chapter 47 of the Nevada Revised Statutes and in the Sanborn decision take place. Finally, the State would request that if, after a focused hearing, there is determined to

be justification for an instruction concerning any evidence presented, that the instruction be drafted in a manner consistent with the specificity set forth in the Nevada Revised Statutes and the Sanborn decision.

Respectfully submitted this \_\_\_\_ day of May,.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

05191263

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing at Reno, Washoe County, Nevada, a true copy of the foregoing document, addressed to:

JoNELL THOMAS, ESQ  
STATE BAR NO. 4771  
302 EAST CARSON AVE., 3RD FLOOR  
LAS VEGAS, NV 89101

ROBERT LANGFORD, ESQ.  
STATE BAR NO. 3988  
WALTON & LANGFORD  
550 EAST CHARLESTON BLVD., #A  
LAS VEGAS, NV 89104

DATED this \_\_\_\_ day of \_\_\_\_\_, 2000.

\_\_\_\_\_

**Priors Certified Constitutional Validity Domestic Battery**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO MOTION TO STRIKE PRIOR CONVICTIONS OF DOMESTIC BATTERY**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and \_\_\_\_\_, Deputy District Attorney, and files this Opposition to Defendant's Motion to Strike Prior Convictions of Domestic Battery. This Opposition is based upon all the pleadings and papers on file herein and the attached Points and Authorities.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_

Deputy District Attorney

**Prior Statement Admissibility**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**POINTS AND AUTHORITIES IN SUPPORT OF ADMISSION**

**OF CERTAIN RECORDED STATEMENTS**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and \_\_\_\_\_, Deputy District Attorney, and offers its Points and Authorities in Support of Admission of Certain Recorded Statements. This brief is supported by the accompanying legal analysis, all papers on file, as well as evidence and arguments previously made before the court.

DATED this \_\_\_\_ day of September, \_\_\_\_\_.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By

Deputy District Attorney

## POINTS AND AUTHORITIES

### STATEMENT OF THE CASE STATEMENT OF THE FACTS ARGUMENT

The admissibility of certain recorded statements after cross-examination of the State's witnesses is controlled by NRS 51.035(2)(b) and NRS 47.120. A prior statement is not hearsay if made by a witness subject to cross-examination, and the statement is "consistent with his testimony and offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." NRS 51.035(2)(b). Additionally, "when any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts." NRS 47.120(1).

This issue has been previously addressed by the Nevada Supreme Court. In the murder case of Crew v. State, 100 Nev. 38, 44 (1984), the State relied heavily on the testimony of a cellmate, Dowell. Dowell was also being held on the charge of murder and was approached by law enforcement and asked if the defendant had made any incriminating statements. Dowell worked out a plea bargain for a reduced charge and gave a statement.

On cross-examination of Dowell, defense counsel read from the statement, pointing out discrepancies between it and Dowell's testimony. At the conclusion of Dowell's testimony, defense counsel put Dowell's attorney on the stand to testify regarding Dowell's arrangement with the prosecution. At that time, the trial court granted the prosecution's motion to admit the statement into evidence "for the purpose of there being any inconsistencies that might have been alluded to by counsel." Appellant maintains that the statement constitutes inadmissible hearsay.

To be admissible under NRS 51.035(2)(b), prior consistent statements must have been made at a time when the declarant had no motive to fabricate. Daly v. State, 99 Nev.564, 665 P.2d 798 (1983); Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981). Since at the time Dowell made his statement his arrangement with the police had yet to be consummated, he clearly had a motive to fabricate. We hold, however, that the statement was properly admitted to rehabilitate Dowell's testimony. Since defense counsel read from the statement to attack Dowell's testimony, the prosecution was entitled to introduce the statement into evidence to clarify the inconsistencies pointed out by counsel. See, United States v. Baron, 602 F.2d 1248 (7th Cir. 1979); NRS 47.,120. As in Baron, most of Dowell's testimony was consistent with the statement; the inconsistencies went only to details. Appellant cannot be permitted to use parts of a prior statement to impeach the

declarant's testimony and then to withhold that same statement from the jury on grounds of unreliability.

Id., at 44-45. For the same result reached, see, United States v. Lujan, 936 F.2d 406, 410-11 (9th Cir. 1991); United States v. Stuart, 718 F.2d 931, 934-35 (9th Cir. 1983); United States v. Allen, 579 F.2d 531, 532-33 (9th Cir. 1978); and United States v. Rinn, 586 F.2d 113, 119-20 (9th Cir. 1978).

Cases have been reversed where the court allowed the State to admit a prior consistent statement and the State failed to show that a declarant had no motive to fabricate. See, Gibbons and Daly, supra. However, if the motive to fabricate could have arguably arisen at two different points in time, and the prior consistent statement was made prior to at least one of the possible motives to fabricate, then the court properly admitted the prior consistent statement to the jury. Cunningham v. State, 100 Nev. 396, 398-99 (1984). See, United States v. Baron, 602 F.2d 1248, 1250-53 (7th Cir. 1979).

In this case, the State's witnesses were cross-examined extensively about prior statements and plea negotiations struck in their own cases. The prior statements were recorded at a time when the witnesses did not have a motive to fabricate since they were made prior to or independent of any negotiations struck in exchange for their cooperation in this case. As a result, the prior recorded statements are admissible.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Privacy Expectation Abandoned Property**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

## **I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

## **III. ARGUMENT**

### **THE DEFENDANT ABANDONED HIS FANNY PACK AND HAS NO REASONABLE EXPECTATION OF PRIVACY IN ITS CONTENTS AND NO STANDING TO CHALLENGE THE LEGALITY OF ITS SEARCH.**

The United States Supreme Court has uniformly held that:

[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action...This inquiry...normally embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy...The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable, whether...the individual's expectation, viewed objectively, is justifiable under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740 (1978).

The Nevada Supreme Court dealt with the issue of abandonment many years ago. Oliver was arrested at a club in Las Vegas for traffic warrants, but was not searched incident to arrest. Oliver v. State, 85 Nev. 10, 11 (1969). When he walked out of the club, he tossed away a white object. The officer picked it up after it hit the ground and determined that it was a marijuana cigarette. The Court noted that the cigarette was not found incident to arrest, and held that "it was abandoned property when it was retrieved by the police officers." Id., at p. 12. The Court reiterated that "where police officers discovered evidence in a public area where it was voluntarily thrown, there was no search, and said: 'Looking at that which is open to view is not a search.'" Id. Further guidance on this issue has been provided by an abundance of federal case law on the topic.

"If a person has voluntarily abandoned property, he has no standing to complain of its search or seizure." United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976), citing, Abel v. United States, 362 U.S. 217, 240-41 (1960). "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts...Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no

longer retained a reasonable expectation of privacy in it at the time of the search." Id. (citations omitted). In deciding whether a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure, the court must look at "the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property." United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986). However, abandonment does not justify a warrantless search or seizure if it was brought about by "unlawful police conduct." Jackson, supra, at p. 409.

Jackson was suspected of possessing narcotics. DEA agents approached him in an airport and asked to speak to him after identifying themselves. Jackson was carrying a suitcase, which he dropped, and then walked away. After taking a few steps, he was arrested. Jackson was advised of his rights and denied dropping the suitcase, claiming that it was not his and that he had never seen it before. The suitcase was searched and contained heroin. The court ruled that setting down the suitcase and walking a few steps away prior to arrest did not indicate an intent to abandon the suitcase without more; but concluded that those circumstances, combined with his post-arrest denial of any interest in the suitcase, constituted abandonment. Id., at pp. 410-11. As a result, Jackson lacked standing to object to its search. Id.

Nordling resembled a suspected rapist-murderer and was asked to step off an airplane about to depart. Nordling agreed. Nordling carried a tote bag onto the plane, but when asked by officers if he had any carry-on luggage he wished to bring with him, he said he did not and left his tote bag under the seat on the plane. Officers determined that Nordling was not the murder suspect, but he was further detained on suspicions of illegal drug or currency transactions. Nordling's tote bag was recovered by law enforcement and contained cocaine. The court held that Nordling had abandoned this bag and did not have standing to complain of its search or seizure. Nordling, supra, at p. 1469.

### **CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
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Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Privacy Legitimate Expectation**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

## **I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

## **III. ARGUMENT**

### **THE DEFENDANT DOES NOT HAVE STANDING TO CLAIM HIS FOURTH AMENDMENTS RIGHTS WERE VIOLATED**

Defendants charged with crimes of possession may claim the benefits of exclusionary rule only if their own Fourth Amendment rights have in fact been violated. U.S. v. Salvucci, 448 U.S. 83 (1980).

The only person who can even complain about alleged police violation of the Fourth Amendment is a person whose own reasonable and legitimate expectation of privacy was intruded upon. Property rights are a factor in determining expectation of privacy but not the only factor.

"The proponent of the suppression motion has the burden of showing his own Fourth Amendment rights were violated." Rakas v. Illinois (1978) 439 U.S. 128. He "must show standing by a preponderance of the evidence." U.S. v. Carr (10th Cir. 1991) 939 F.2d 1442.

## **III**

### **DEFENDANT HAS ABANDONED THE PROPERTY**

The true test of abandonment is whether the person retains a reasonable/legitimate expectation of privacy. A person cannot complain of a warrantless search of an item he has abandoned. Abel v. U.S. 362 U.S. 628 (1959)

The majority of courts hold that a disclaimer of ownership constitutes abandonment. In U.S. v. Thomas, (1994) 12 F.3d 1350 the Court held that,

"Gregg nevertheless contends that because Collins did not have probable cause to search the camera bag in which Collins found marijuana and cocaine, the evidence should be suppressed. However, Gregg ignores the fact that he abandoned the camera bag. When Collins asked Gregg who owned the bag, Gregg shrugged his shoulders and stated that he did not know. Gregg thus abandoned the bag, allowing Collins to examine its contents. Piaget, 915 F.2d at 140; Garcia, 849 F.2d at 919; United States v. Canady, 615 F.2d 694, 697 (5th Cir.), cert. denied, 449 U.S. 862, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980). "Once a bag has been abandoned, and the abandonment is not a product of improper police conduct, the defendant cannot challenge the subsequent search of the bag." Piaget, 915 F.2d at 140. As Collins had probable cause both to stop Gregg's vehicle and to search it, Gregg

could not have abandoned the bag as result of improper police conduct. Consequently, we find no error in the district court's denial of Gregg's motion to suppress.

**ONE WHO DISCLAIMS ANY INTEREST IN A CONTAINER  
THEREBY DISCLAIMS ANY CONCERN ABOUT WHETHER OR NOT  
THE CONTENTS OF THE CONTAINER REMAIN PRIVATE.**

The Court dealt extensively with the issue of denial of ownership in United States v.

Tolbert (1982) 692 F.2d 1041.

The Supreme Court has noted that the concept of a "legitimate expectation of privacy" incorporates two elements: The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," [Katz v. United States] 389 U.S. [347] at 361, [88 S.Ct. 507 at 516, 19 L.Ed.2d 576 (1967)] whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private." *Id.*, at 351 [88 S.Ct., at 511]. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" *id.* at 361 [88 S.Ct., at 516]--whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Id.*, at 353 [88 S.Ct., at 512], See *Rakas v. Illinois*, 439 U.S., at 143-144 n. 12 [99 S.Ct., at 430-431 n. 12], *id.*, at 151 [99 S.Ct., at 434], (concurring opinion); *United States v. White*, 401 U.S. [745] at 752 [91 S.Ct. 1122 at 1126, > 28 L.Ed.2d 453 (1971) ] (plurality opinion).

*Smith v. Maryland*, 442 U.S. 735, 741-42, 99 S.Ct. 2577, 2580-2581, 61 L.Ed.2d 220 (1978). See *United States v. Bailey*, 628 F.2d 938, 941 (6th Cir.1980).

Applying these principles to the facts of the case at bar, the Court is constrained to conclude that Tolbert possessed no reasonable expectation of privacy in the suitcase at the time of the search. When Tolbert was approached by the agents, she was entering a taxicab apparently intent on departing the airport without her luggage. This fact alone would not support a finding that she maintained no subjective belief that her bag was secure from government intrusion. An individual may depart from an airport without claiming her luggage for a variety of reasons, with full and legitimate intent to return and claim the baggage.

In the instant case however, Tolbert insisted that she was traveling without luggage and specifically disclaimed ownership of the bag in issue. Tolbert can hardly assert that she "exhibited an actual (subjective) expectation of privacy" respecting the luggage when she specifically disclaimed ownership thereof. As the First Circuit Court of Appeals stated: "One who disclaims any interest in luggage thereby disclaims any concern about whether or not the contents of the luggage remain private." *United States v. Miller*, 589 F.2d 1117, 1131 (1st Cir.1978). This conclusion is consistent with decisions by other Circuits addressing the issue. See, e.g., *United States v. Kendall*, 655 F.2d 199 (9th Cir.1981), cert. denied, --- U.S. ---, 102 S.Ct. 1434, 71 L.Ed.2d 652 (1982); *United States v. Berd*, 634 F.2d 979 (5th

Cir.1981); *United States v. Canady*, 615 F.2d 694 (5th Cir.1980), cert. denied, 449 U.S. 862, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980); *United States v. Colbert*, 474 F.2d 174 (5th Cir.1973) (en banc); cf. *United States v. Washington*, 677 F.2d 394, 396 (4th Cir.1982) (although stating that it was not an abandonment case, the court concluded that where a defendant specifically denied ownership of a suitcase, agents "could justifiably rely on her statements to think they would not violate her rights by opening the bag.")

In sum, because, by her actions and vigorous oral disclaimers, Tolbert affirmatively indicated that she had no interest in preserving the secrecy of the contents of the suitcase, she had no legitimate expectation of privacy therein. Accordingly, Tolbert's Fourth Amendment rights were not violated by the search of the suitcase. *United States v. Tolbert* (1982) 692 F.2d 1041 at p. 1045.

**THE STATE CAN ARGUE THAT THE DEFENDANT POSSESSED THE CONTROLLED SUBSTANCES BUT WAS NOT SUBJECT TO A 4TH AMENDMENT VIOLATION**

It is now the rule that a prosecutor, without legal contradiction, may simultaneously maintain that a defendant criminally possessed the seized goods but was not subject to a Fourth Amendment deprivation. *U.S. v. Salvucci* (1980) 448 U.S. 83. The underlying assumption for such "vice of prosecutorial self-contradiction" that possession of seized goods is the equivalent of Fourth Amendment "standing" to challenge the search creates to broad a gauge for measurement of Fourth Amendment rights. Rather, it must be asked not merely **whether the defendant has a possessory interest in the items seized but also whether he had an expectation of privacy in the area searched.** Id at 85 citing *Rakas v. Illinois* 439 U.S. 128.

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Privilege Confessor**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

OPPOSITION TO MOTION IN LIMINE RE:  
CONFESSOR/CONFESSANT PRIVILEGE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and \_\_\_\_\_ Deputy District Attorney, and offers its Opposition to the Motion in Limine Re: Confessor/Confessant Privilege filed by defendant on January 21, 2000.

This Opposition is based upon the following Points and Authorities and the pleadings and papers on file herein.

**POINTS AND AUTHORITIES**

**FACTS**

**ARGUMENT**

NRS 49.015(1) provides that:

Except as otherwise required by the constitution of the United States or the State of Nevada, and except as provided in this title are title fourteen of NRS, no person has a privilege to:

- (a) refuse to be a witness;
- (b) refuse to disclose any matter;
- (c) refuse to produce any object or writing; or
- (d) prevent another from being a witness or disclosing any matter or producing an object or writing.

The above-quoted NRS section clearly adopts the long-accepted premise that privileges are creatures of statute. Absent an express statutory provision, no privilege applies. NRS 49.015.

Privilege statutes are to be strictly and narrowly construed because they inhibit the truth-finding function.

United States v. Nixon, 418 U.S. 683, 710 (1974).

A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness **as to any confession made to him in his professional character**. (Emphasis added).

It is well settled that where the statement is not made in a **confidential setting**, no privilege will apply. See, McNair v. Eighth Judicial District Court, 110 Nev. 1285, 1289 (1994), citing, Lieu v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981); Delaney v. Superior Court, 50 Cal.3d 785 (1990); see also, United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989) (voluntary disclosure of a confidential communication to a third party waives any privilege).

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Privilege Marital**

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

NRS 49.295 sets forth the marital privilege. However, the statute also sets forth several exceptions which render the privilege inapplicable. NRS 49.295(2) provides in pertinent part:

2. The provisions of Subsection 1 do not apply to a:

...

(e) Criminal proceeding in which one spouse is charged with:

(1) A crime against the person or the property of the other spouse or of a child of either, **or of a child in the custody or control of either**, whether the crime was committed before or during the marriage. (Emphasis added).

In Meador v. State, 101 Nev. 765 (1985), the Nevada Supreme Court addressed the issue at hand. In that case the defendant was not related to the various female victims, all of whom were between the ages of eight and twelve. Appellant and his own daughter went with the victims on various outings, including swimming, horseback riding, and trips to the movies. The victims also went to the defendant's residence for "stay overs" with the victim's daughter. The defendant's wife and a second daughter also resided with the defendant at the residence.

The defendant was charged with multiple counts of Lewdness and Sexual Assault for allegedly molesting various girls at public swimming pools, at movies, at the ranch where the horseback outing occurred, as well as in his home.

At trial the girls testified that they did not report the incidents immediately because they did not understand what was happening to them, and because they were scared or embarrassed. The victims ranged in age from eight to twelve. At trial an expert testified that the girls' silence was typical of molested children because children under the age of 12 years are not aware of their sexual identities and are incapable of making abstract judgements. The victims were all friends of the defendant's 11-year-old daughter. Meador, Id., at pp. 766-767.

On appeal Meador contended that the District Court erred in allowing his wife to testify against him after he had invoked the marital privilege. The Nevada Supreme Court held that the husband and wife privilege was inapplicable pursuant to Subsection 2(e)(1). (See full quotation above.)

The Nevada Supreme Court stated: The statute plainly provides that the privilege is inapplicable where the spouse invoking the privilege has been charged with a crime against a child in the custody or control of either spouse. The record indicates that appellant had physical control over the girls during the molestations. We conclude that appellant's physical control over the girls at the time of the molestation satisfies the requirements of the exception to the privilege. Meador, Id., at p. 768.

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

**Privilege Spousal Child Sexual Assault**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

### I. STATEMENT OF THE CASE

### II. STATEMENT OF THE FACTS

### III. ARGUMENT

NRS 49.295 sets forth the marital privilege. However, the statute also sets forth several exceptions which render the privilege inapplicable. NRS 49.295(2) provides in pertinent part:

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(e) Criminal proceeding in which one spouse is charged with:

(1) A crime against the person or the property of the other spouse or of a child of either, **or of a child in the custody or control of either**, whether the crime was committed before or during the marriage. (Emphasis added).

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At trial the girls testified that they did not report the incidents immediately because they did not understand what was happening to them, and because they were scared or embarrassed. The victims ranged in age from eight to twelve. At trial an expert testified that the girls' silence was typical of molested children because children under the age of 12 years are not aware of their sexual identities and are incapable of making abstract judgements. The victims were all friends of the defendant's 11-year-old daughter. Meador, Id., at pp. 766-767.

On appeal Meador contended that the District Court erred in allowing his wife to testify against him after he had invoked the marital privilege.

The Nevada Supreme Court held that the husband and wife privilege was inapplicable pursuant to Subsection 2(e)(1). (See full quotation above.)

The Nevada Supreme Court stated: The statute plainly provides that the privilege is inapplicable where the spouse invoking the privilege has been charged with a crime against a child in the custody or control of either spouse. The record indicates that appellant had physical control over the girls during the molestations. We conclude that appellant's physical control over the girls at the time of the molestation satisfies the requirements of the exception to the privilege. Meador, Id., at p. 768.

**CONCLUSION**

The defendant's contention that the marital privilege applies in the context of the present case is without merit.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Probable Cause to Arrest**

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IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

**LEGALITY OF DEFENDANT'S ARREST**

NRS 171.124(1) grants authority to a peace officer to make an arrest without a warrant when the person arrested has committed a felony or gross misdemeanor, although not in his presence.<sup>14</sup>

"Probable cause to make an arrest without a warrant exists if facts and circumstances known to the officers at the moment of the arrest would warrant a prudent man (sic) in believing that felony had been committed by person arrested." Thomas v. Sheriff, 85 Nev. 551, 553, 459 P.2d 219, 221 (1969). "Probable cause is not based on the knowledge of a specific police officer but is based on the collective knowledge of all the officers involved." Doleman v. State, 107 Nev. 409, 413-414 812 P.2d 1287, 1290 (1991), (citations omitted).

**III. CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

---

<sup>14</sup> Subsection (2) also grants authority to that peace officer: "He may also, at night, without a warrant arrest any person whom he has reasonable cause for believing to have committed a felony or gross misdemeanor, and is justified in making the arrest, thought it afterward appear that a felony or gross misdemeanor has not been committed."

**Procuring Agent**

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\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

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Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

**Procuring Agent**

An affirmative defense exists as a matter of law only where "clear, uncontroverted evidence exists in the record which establishes the defense..." Sheriff v. Roylance, 110 Nev. 334, 871 P.2d 359, 362 (1994), quoting Sheriff v. Gleave, 104 Nev. 496, 498, 761 P.2d 416, 417-18 (1988). The "procuring agent" defense "applies only when the defendant obtains the controlled substance from a person with whom he has not associated in selling drugs." Hillis v. State, 103 Nev. 531, 536, 746 P.2d 1092 (1987). Moreover, "if a defendant receives part of the controlled substance for his own use or any amount of money in consideration for the transaction, the defense of procuring agency is not available." Love v. State, 111 Nev. 545, 548, 893 P.2d 376 (1995); citing Dixon v. State, 94 Nev. 662, 584 P.2d 693 (1978).

**CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Property Abandoned Expectation of Privacy**

CODE

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

## **I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

## **III. ARGUMENT**

### **THE DEFENDANT ABANDONED HIS FANNY PACK AND HAS NO REASONABLE EXPECTATION OF PRIVACY IN ITS CONTENTS AND NO STANDING TO CHALLENGE THE LEGALITY OF ITS SEARCH.**

The United States Supreme Court has uniformly held that:

[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action...This inquiry...normally embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy...The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable, whether...the individual's expectation, viewed objectively, is justifiable under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740 (1978).

The Nevada Supreme Court dealt with the issue of abandonment many years ago. Oliver was arrested at a club in Las Vegas for traffic warrants, but was not searched incident to arrest. Oliver v. State, 85 Nev. 10, 11 (1969). When he walked out of the club, he tossed away a white object. The officer picked it up after it hit the ground and determined that it was a marijuana cigarette. The Court noted that the cigarette was not found incident to arrest, and held that "it was abandoned property when it was retrieved by the police officers." Id., at p. 12. The Court reiterated that "where police officers discovered evidence in a public area where it was voluntarily thrown, there was no search, and said: 'Looking at that which is open to view is not a search.'" Id. Further guidance on this issue has been provided by an abundance of federal case law on the topic.

"If a person has voluntarily abandoned property, he has no standing to complain of its search or seizure." United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976), citing, Abel v. United States, 362 U.S. 217, 240-41 (1960). "Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts...Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no

longer retained a reasonable expectation of privacy in it at the time of the search." Id. (citations omitted). In deciding whether a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure, the court must look at "the totality of the circumstances, and two important factors are denial of ownership and physical relinquishment of the property." United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986). However, abandonment does not justify a warrantless search or seizure if it was brought about by "unlawful police conduct." Jackson, supra, at p. 409.

Jackson was suspected of possessing narcotics. DEA agents approached him in an airport and asked to speak to him after identifying themselves. Jackson was carrying a suitcase, which he dropped, and then walked away. After taking a few steps, he was arrested. Jackson was advised of his rights and denied dropping the suitcase, claiming that it was not his and that he had never seen it before. The suitcase was searched and contained heroin. The court ruled that setting down the suitcase and walking a few steps away prior to arrest did not indicate an intent to abandon the suitcase without more; but concluded that those circumstances, combined with his post-arrest denial of any interest in the suitcase, constituted abandonment. Id., at pp. 410-11. As a result, Jackson lacked standing to object to its search. Id.

Nordling resembled a suspected rapist-murderer and was asked to step off an airplane about to depart. Nordling agreed. Nordling carried a tote bag onto the plane, but when asked by officers if he had any carry-on luggage he wished to bring with him, he said he did not and left his tote bag under the seat on the plane. Officers determined that Nordling was not the murder suspect, but he was further detained on suspicions of illegal drug or currency transactions. Nordling's tote bag was recovered by law enforcement and contained cocaine. The court held that Nordling had abandoned this bag and did not have standing to complain of its search or seizure. Nordling, supra, at p. 1469.

### **CONCLUSION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Prosecution Dual Information and Indictment**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney, and \_\_\_\_\_, Deputy District Attorney, and responds to Defendant's Petition for Writ of Habeas Corpus. This Response is supported by the attached Points and Authorities and the transcript of the Grand Jury proceeding in this matter.

DATED this \_\_\_ day of May, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

**STATEMENT OF THE FACTS**

**ARGUMENT**

**I. MAY THE STATE PURSUE A GRAND JURY INDICTMENT AFTER AN INFORMATION HAS BEEN FILED FOR CHARGES ARISING OUT OF THE SAME ARREST? YES, THE STATE IS PERMITTED TO PROCEED WITH DUAL PROSECUTION.**

Mr. Peralta asserts that the grand jury was without the power to find a true bill against him because he had already been arraigned on an Information filed in case no. CR99-0578 for charges arising out of the same arrest. Mr. Peralta cites Serrano v. State, 83 Nev. 324 (1967), and argues that NRS 172.107 acts as a bar to the grand jury returning an indictment once the information was filed:

A district attorney shall not use a grand jury **to discover** tangible, documentary or testimonial evidence to assist in the prosecution of a defendant who has already been charged with the public offense by indictment or information.

NRS 172.107 (emphasis added).

Contrary to Mr. Peralta's argument, NRS 172. 107 does not act as a bar to seeking an indictment after an information has been filed, and Serrano can easily be distinguished from this case. In Serrano, the defendant was arrested for murder on September 14th.

On September 30 the grand jury heard three witnesses and returned an indictment that day, charging Serrano with Forget's murder. Two other witnesses were subpoenaed but did not testify. On October 3 the grand jury resubpoenaed the latter two witnesses in the same case, heard their testimony, but returned no further indictments...A dispute developed whether the grand jury hearing of October 3 was directed to other charges arising out of the same case or simply a device employed by the district attorney to discover testimony of other witnesses who might be favorable to appellant. The trial judge after an *in camera* inspection of the October 3 transcript denied appellant's request for a copy of it.

Serrano, *supra*, at p. 326. The court noted that there is authority to support Serrano's contention that "the grand jury had no power to continue its investigation of appellant's case after returning its indictment or to

lend its investigatory powers to the district attorney for discovery purposes," but did not render a ruling on the issue since the defendant had not properly raised it on appeal. Id., at p. 327.

NRS 172.107 and Serrano prohibit the district attorney from abusing the grand jury process as a means of discovering or fishing for evidence once an information or indictment has been filed, but does not prevent dual prosecution. In this case, the record clearly shows that the State was not fishing for evidence, but instead sought in essence a superseding indictment to charge the defendant with both the charges dismissed at the preliminary hearing as well as charges on which he was bound over to the district court; such conduct is permissible.

Dual prosecution has been upheld several times in Nevada. "It is the rule in this state that felonies may be prosecuted by either indictment or information." Tertrou v. Sheriff, 89 Nev. 166, 168 (1973). The court first addressed the issue of dual prosecution and upheld such a practice in the case of Tellis v. State, 85 Nev. 557 (1969). In Tellis, a criminal complaint was filed against the defendant on October 30; a preliminary hearing had been continued from December 4 to December 14; and a grand jury indictment was returned on November 29 with the accompanying arrest warrant signed on December 1. On December 14, the State dismissed the criminal complaint. In upholding prosecution on the indictment, the court stated:

The question of whether an indictment could be returned while a criminal complaint covering the same offense was outstanding was not presented to the district court, but was raised *sua sponte* by this court...we find no jurisdictional defect in such a dual proceeding in a criminal matter..."That the offense alleged in the indictment was identical crime charged in the information was not material to the proceedings on the indictment. Hence, the trial on the indictment was in order. The mere fact that the same offense was charged in the indictment that had previously been charged in the information does not establish any legal connection between the two pleadings. [citation] The dismissal of the information put an end to it as effectively as though it had never been filed." [citation]

Tellis, supra, at p. 561.

In Turpin v. Sheriff, the court denied a writ of habeas corpus challenging an indictment filed after the defendant had been arraigned on a nearly identical information in district court (the State had dismissed the information after the grand jury indicted Turpin). Turpin complained that dismissal of the

information precluded prosecution on the indictment, but the court disagreed. Citing Tellis, supra, the court stated:

[W]e there found no jurisdictional defect in dual proceedings against an accused consisting of a grand jury indictment for the same offense which had been previously charged in an outstanding information. That holding was affirmed in Hall v. Sheriff, 86 Nev. 456, 470 P.2d 422 (1970), where we again approved such dual proceeding as the concurrent pendency of a grand jury indictment and a criminal complaint. It was reaffirmed by Simpson v. Sheriff, 86 Nev. 803, 476 P.2d 957 (1970). In Tellis, Hall and Simpson, supra, the prior proceedings by which the prosecution had been commenced were dismissed by the state after the grand jury indictment had been returned... We fail to discern any prejudice to an accused when one of two pending vehicles for prosecution is dismissed, leaving him accused by only one. Such an election by the state is in no way detrimental to the accused, so long as the prohibition of NRS 178.562(1) against "*another prosecution*" is not violated. In this connection we hold that the state's election to proceed on one of two pending and viable forms of prosecution, its dismissal of the proceeding under which it has elected not to prosecute, is not in violation of the provisions of NRS 178.562(1).

Turpin, supra, at p. 238. Similarly, the State's action was upheld where it sought and obtained a grand jury indictment during a recess in the middle of a preliminary hearing on identical charges, "[t]he fact that a portion of the preliminary examination had been conducted when the indictment was returned neither invalidates nor proscribes the indictment." Tertrou, supra, at p. 169.

The State's action was upheld where it obtained a grand jury indictment prior to a scheduled preliminary hearing on the same case, but after hearing defense counsel in justice court make specific mention of various perceived inadequacies in the State's case. State v. Maes, 93 Nev. 49 (1977). In reinstating the indictment dismissed by the district court, the court ruled that initiating the grand jury process after learning of defense's strategy to attack perceived weaknesses in the State's case "cannot be categorized as an abuse of power vested in the prosecution. "It can neither be categorized as "conscious indifference to rules of procedure affecting a defendant's rights, [citation omitted] or the willful neglect thereof." Id., at p. 51.

**II. DID THE STATE PROVIDE SUFFICIENT EVIDENCE TO SUPPORT THE INDICTMENT? YES, THE GRAND JURY RECEIVED COMPETENT EVIDENCE THAT ESTABLISHED PROBABLE CAUSE TO BELIEVE THE CRIMES PRESENTED IN THE INDICTMENT HAD BEEN COMMITTED.**

The defendant argues that the State failed to present sufficient evidence to support the Grand Jury's finding of probable cause on several counts. "The grand jury ought to find an indictment when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant committed it." NRS 172.155(1).

As Mr. Peralta correctly notes in his Petition, the finding of probable cause may be based on slight or even marginal evidence. Sheriff v. Miley, 99 Nev. 377 (1983). In reviewing the sufficiency of evidence presented to the grand jury, the court has stated that the elements of an offense "may be shown by circumstantial evidence and reasonably drawn inferences." Hall v. Sheriff, 86 Nev. 456, 458 (1970). See, Brymer v. Sheriff, 92 Nev. 598 (1976); Kinsey v. Sheriff, 87 Nev. 361 (1971).

"The discharge of a person accused upon preliminary examination is a bar to another complaint against him for the same offense, but does not bar the finding of an indictment or filing of an information." NRS 178.562(2) (emphasis added). Clearly, the statutes permit the State to seek a grand jury indictment after charges are dismissed at a preliminary hearing. See also, Simpson v. Sheriff, 86 Nev. 803, 805 (1970); Sheriff v. Harrington, 108 Nev. 869, 870-71 (1992).

1. The grand jury is not bound to hear evidence for the defendant. It is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they shall order that evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

2. If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury.

NRS 172.145(1) and (2). "The determination of whether particular evidence is exculpatory is generally left to the discretion of the district court." Ostman v. District Court, 107 Nev. 563, 564 (1991).

### CONCLUSION

DATED this \_\_\_\_ day of \_\_\_\_\_,

.  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By

Deputy District Attorney

**Psychiatric Examination Compelled by the Court**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

It is well settled that a trial court has the authority to compel a psychiatric or psychological evaluation of a defendant in a criminal case in order to rebut or respond to mental health evidence offered by the defense. State v. Hess, 828 P.2d 382 (Montana 1992); U. S. v. Reisstreck, 535 F.2d 1030 (1976); State v. Briand, 547 A.2d 235 (New Hampshire 1988). The defendant does not have a Fifth Amendment right nor a Sixth Amendment right to refuse such a court-ordered examination. United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984); United States v. Cohen, 530 F.2d 43 (5th Cir. 1976); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Albright, 388 F.2d 79 (4th Cir. 1964); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); United States v. Wade, 49 F.2d 258 (9th Cir. 1973); United States v. Handy, 454 F.2d 885 (9th Cir. 1972); Hollis v. Smith, 571 F.2d 685 (2nd Cir. 1978).

**CONCLUSION**

Based upon the foregoing, the State respectfully requests that the Court enter an Order compelling the defendant to submit to a psychiatric or psychological examination by a State psychiatrist or psychologist. The State requests that the Court enter its Order now so as to avoid the necessity of any further continuances in this matter.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Psychiatric Examination of a Witness**

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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO DEFENSE MOTION IN LIMINE:  
STATE'S MOTION TO FORECLOSE IMPROPER  
USE OF CHARACTER EVIDENCE, PREVENT UNLAWFUL  
PSYCHIATRIC EVALUATION OF PROSECUTION WITNESSES**

COMES NOW, the State of Nevada, by and  
through RICHARD A. GAMMICK, District Attorney of Washoe County, and

, Deputy District Attorney, and submits its opposition to motions filed by defense  
counsel.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

**STATEMENT OF THE FACTS**

**ARGUMENT**

Counsel has not stated whether her request to examine the parents is predicated on competency issues, or whether it is an attempt to attack credibility. In United States v. Jackson, 576 F.2d 46, 49 (5th Cir.1978) the court, in declining a request for the mental examination of prosecution witnesses observed that in addition to seriously impinging upon a witness' right to privacy, such an examination could also be used to harass, deter witnesses from coming forward and cause a chilling effect on the detection of crime. This is precisely what will happen in this case if the parents are forced to be "evaluated" by a defense psychologist.

The courts are virtually unanimous in holding that psychiatric testimony regarding the credibility of a witness will not be admissible. That view has been expressed in many ways. In United States v. Fountain, 840 F.2d 509, 517 (7th Cir.), cert. denied, 488 U.S. 982, 109 S.Ct. 533, 102 L.Ed.2d 564 (1988). The court refused to require a witness to submit to a psychiatric examination before testifying and made this observation:

The district court was entitled to be leery of both psychiatric examinations of witnesses and psychiatric testimony about witnesses, because the jury can observe for itself ... the witness' behavior. Criminal trials are complex enough without turning them into collateral investigations of the witnesses -- investigations that would not only drag out trials and confuse jurors but also discourage people from serving as witnesses. 840 F.2d at 517.

In United States v. Eschweiler, 745 F.2d 435, 438 (7th Cir.1984), cert. denied, 469 U.S. 1214, 105 S.Ct. 1188, 84 L.Ed.2d 334 (1984) the court reaffirmed its reluctance to encumber criminal proceedings with psychiatric examinations of witnesses, a determination that the court previously made in United States v. Gutman, 725 F.2d 417, 420 (7th Cir.), cert. denied, 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d 183 (1984).

In United States v. Ramirez, 871 F.2d 582, 584 (6th Cir.), cert. denied, 493 U.S. 841, 110 S.Ct. 127, 107 L.Ed.2d 88 (1989) the court held that it cannot order a non-party witness to be examined by

a psychiatrist. At best, it could merely condition such witness' testimony on a prior examination. Citing and quoting from United States v. Gutman, supra, the court continued:

The courts that have addressed the question agree, however, that the power not to allow a witness to testify unless he submits to a psychiatric examination should be exercised sparingly. (Citations omitted).

If the doors are opened to a battle of experts testifying as to a witnesses' credibility, there would be no end to the collateral consequences. There would be just as much reason to want such testimony as to an accomplice witness, an informer, or a witness who had cut a deal with the government as there would be to a drug user, or a parent who discovers his child has been molested or beaten. In this era of increasing use of experts in both civil and criminal trials, the sad truth is that an "expert" can be found to testify on behalf of almost any viewpoint or position. Wisely, the courts have historically left credibility determinations to the trier of fact, and counsel offers no compelling reason to depart from that procedure under the facts of this case.

In United States v. Gutman, supra, the court stated,

We are reluctant to open the door to sanity hearings for witnesses.... It is unpleasant enough to have to testify in a public trial subject to cross-examination without also being asked to submit to a psychiatric examination the results of which will be spread on the record in open court to disqualify you, or at least to spice up your cross-examination.

In United States v. Barnard, 490 F.2d 907 (9th Cir.1973), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974), the defendants sought to introduce the testimony of a psychiatrist and a psychologist as to their opinions of a government witness' competency and reliability as a witness. The psychiatrist and the psychologist had read the Army psychiatric evaluation and the grand jury testimony of the witness and observed him during part of his testimony in court. On the basis of the foregoing, each had formed the opinion that the witness would lie if it were to his benefit to do so and was a sociopath. The trial judge did not permit that testimony. In affirming that ruling, the court said, at pages 912-13:

As we have seen, competency is for the judge, not the jury. Credibility, however, is for the jury -- the jury is the lie detector in the courtroom. Judges frequently instruct juries about factors that the jury may or should consider in weighing the veracity of a witness. In this respect it can be said that judges assume that they have certain expertise in the matter, and that juries have less of that expertise than judges. It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries,

and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. Perhaps. The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say that when such testimony is offered, the judge must admit it.

It is established that cross-examination may be limited where the sixth amendment interest is outweighed by the danger of harassing witnesses or unduly prejudicing the jury. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The proper extent of cross-examination lies within the sound discretion of the trial court. Skinner v. Cardwell, 564 F.2d 1381, 1388-89 (9th Cir. 1977). The trial court may limit or even prohibit a proffered line of inquiry that is minimally relevant. *Id.* at 1389.

Counsel's cited cases deal with evaluation of sexual assault victims. The court's rationale for permitting such examinations of minor victims is substantially different than that required in cases where the defendant is seeking evaluation of nonvictim government witnesses. In Latham v. State, 790 P.2d 717 (Alaska App.1990), the target was an informant. In State v. Morant, 242 Conn. 666, 701 A.2d 1 (1997), the court considered whether the trial court should have permitted evaluation of an accomplice. In affirming the trial court's refusal, the appellate court stated: "Our case law demonstrates that the 'drastic measure' of ordering a psychiatric examination ... should be taken only upon 'compelling reasons.'" *Ibid.* 242 Conn. at 679, 701 A.2d 1.

In order to avoid victim harassment, the Alaskan court adopted a two-prong balancing test to reconcile the defendant's right to gather facts relevant to his defense with the sexual assault victim's constitutionally protected right to privacy. First, the defendant seeking a psychiatric examination of a prosecuting witness must make a specific showing of need for an evaluation by showing that the prosecuting witness may have specific mental or emotional problems directly related to the issues in the case. Second, the court requires the defendant to demonstrate that the testimony of the person to be examined is uncorroborated or otherwise untrustworthy. Pickens v. State, 675 P.2d 665, at 668-9, (Alaska App.1984). See also Moor v. State, 709 P.2d 498, 508 (Alaska App.1985).

Additionally, the United States Supreme Court has held that:

The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting

unfavorable testimony. Pennsylvania v. Ritchie (1987), 480 U.S. 39, 53, 107 S.Ct. 989, 999, 94 L.Ed.2d 40, 54.

For all the above reasons, the court should deny the defense request.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Psychiatric Examination of Adult Victim Sexual Assault**

CODE 2645  
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO DEFENDANT'S MOTION**  
**RE: PSYCHIATRIC TESTING OF ALLEGED VICTIM**  
**AND TO DETERMINE COMPETENCY TO TESTIFY**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this Opposition to the Defendant's Motion Re: Psychiatric Testing of Alleged Victim and To Determine Competency to Testify. This Opposition is supported by all papers and pleadings on file herein, the attached Points and Authorities, and any oral argument this Honorable Court may entertain in this matter.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_

POINTS AND AUTHORITIES

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

The defendant has correctly set out the standards set by the Nevada Supreme Court for ordering psychiatric and psychological evaluations of a *child* victim of sex crimes. In Marvelle v. State, 114 Nev.

103, 966 P.2d 151 (1998), the Court held:

A district court has discretion to grant a request for a psychological evaluation of a *child-victim*, based on the facts and circumstances of each case, after considering four factors: 1) whether the State has employed an expert in psychiatry or psychology to examine the *child*; 2) whether there is a compelling need to protect the *child*; 3) whether evidence of the crime has little or no corroboration beyond the *child's* testimony; and 4) whether there is a reasonable basis to believe that the *child's* mental or emotional state may have affected her veracity. Keeney v State, 109 Nev. 220, 226, 850 P.2d 311, 314 (1993). Emphasis added.

The Court in Marvelle and Keeney, cited herein above, set these standards for evaluating child victims in cases where there was little or no corroboration of the allegations of sex offenses against those children. Moreover, the Court has addressed these same issues and set out the same four conditions in two other leading cases. The Court addressed these issues in Lickey v. State, 108 Nev. 191, 827 P.2d 824 (1992) which dealt with allegations that the defendant committed sex offenses on an eight year old child. Also, the Court addressed these same issues in Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987) which dealt with allegations that the defendant committed sex offenses on a child who was nine years old at the time.

It is clear from these four leading cases that the Court has set the four standard conditions for psychiatric or psychological evaluations of child victims. The State respectfully contends that the standards cited by the defendant in support of his Motion have not been expanded to include adult victims.

Further, it is the position of the State that there is no reason for this Honorable Court to expand those standards to the adult victim in the instant case. The standards set out herein above are

designed to guide district courts through cases involving child victims as witnesses in cases where it is basically the child's word against that of the adult defendant. Admittedly, there is a reluctance to convict a defendant on the word of a child alone. Moreover, most district courts require some form of qualification of a child victim before he or she is determined to be a competent witness. Finally, children are regarded as being more susceptible to suggestive, though well intended, questioning techniques of members of law enforcement, the child's family, the child's school faculty, and even the child's mental health professionals. For a detailed analysis of all aspects of this problem, see Felix v. State, 109 Nev. 151 849 P.2d 220 (1993).

However, those sorts of problems do not exist when the victim is an adult, not a child. Moreover, as an adult victim, she was not susceptible to suggestive questioning techniques by anyone involved in this case.

Therefore, the State respectfully requests that this Honorable Court deny the defendant's motion on the basis that such evaluations are and should be limited to child-victim-witnesses.

2. Applying the Standards to the Instant Case. Should this Honorable Court be inclined to apply the standards set out herein above to the instant case, the State respectfully submits the following analysis.

a. The State has endorsed an expert to testify, if necessary, in either the State's in chief or in rebuttal, as appropriate. Therefore, this standard or condition supports the defendant's motion. However, if this Honorable Court denies the defendant's motion in this regard, it is far less likely that the State would need to call the victim's psychiatrist.

b. There is a need to protect the victim from any more humiliation and embarrassment than is usually attendant to a sexual assault criminal investigation, preliminary examination, and jury trial. Having her psychiatrically evaluated to determine her competency to testify as a witness serves no purpose other than to further humiliate and embarrass her. Therefore, the State respectfully contends that there is a compelling reason to protect the victim in the instant case.

c. The State respectfully contends that unlike the cases cited herein above there is corroboration of the crimes of sexual assault beyond the victim's statement.

d. The State contends that there is no reasonable basis to believe that the victim's mental or emotional state may have affected her veracity.

Based on the application of the four standards discussed herein above, the State respectfully requests that this Honorable Court deny the defendant's motion.

**IV. CONCLUSION**

Based on the discussion herein above, the State respectfully requests that this Honorable Court find that the standards set out herein above are applicable to child-victim-witnesses and not the adult-victim-witnesses. Therefore, the defendant's motion should be denied. In the alternative, the State contends that the application of these standards to the instant case leads to the conclusion that defendant's motion should likewise be denied.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Psychiatric Examination of Child Victim Sexual Assault**

CODE

Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**OPPOSITION TO MOTION FOR ORDER COMPELLING EVALUATION OF  
ALLEGED VICTIMS**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

The defendant relies on the holding in Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) as the sole basis for requesting a psychiatric evaluation of the victim in this case. Further, the defendant sets out the two reasons cited in Warner as the bases for this Honorable Court to grant this Motion. Those bases are there is a question of the victim's credibility and there is no independent evidence of the offenses, other than the victim's testimony.

The State respectfully counters that the controlling cases involving this issue are Marvelle v. State, 114 Adv. Op. 103 (Nev. 1998) and Keeney v. State, 109 Nev. 220, 850 P.2d 311 (1993). In both these cases, the Supreme Court of Nevada has held that there are four factors the trial court should consider when ruling on this motion. The Court said :

A district court has discretion to grant a request for a psychological evaluation of a child-victim, based on the facts and circumstances of each case, after considering four factors: 1) whether the State has employed an expert in psychiatry or psychology to examine the child; 2) whether there is a compelling need to protect the child; 3) whether the evidence of the crime has little or no corroboration beyond the child's testimony; and 4) whether there is a reasonable basis to believe that the child's mental or emotional state may have affected (his) veracity.

See Marvelle v. State, 114 Adv. Op. 103 at page 5 and Keeney v. State, 109 Nev. 220, 226, 850 P.2d 311, 314 (1993). The State will review each factor in the order set out by the Supreme Court.

The first factor is whether the State has employed an expert in psychiatry or psychology to examine the child-victim. In the instant case, the State has not employed such an expert. No such State requested examination has been done of the child-victim. Furthermore, the State will not be calling anyone purporting to be an expert as was the situation in Marvelle, cited herein above. Of course, should this

Honorable Court grant the defendant's Motion in this regard, the State reserves the right to call an expert of its own concerning any findings and opinions of the defense expert.

The second factor is whether there is a compelling need to protect the child-victim. The State will not cite a specific compelling need to protect the child-victim. However, the respectfully urges caution in that no evaluation of a child-victim should be undertaken lightly. Such an evaluation is a serious matter which will have an effect on the child-victim.

The third factor is whether evidence of the crime has little or no corroboration beyond the child-victim's testimony.

The fourth and final factor is whether there is a reasonable basis to believe that the child-victim's mental or emotional state may have affected his veracity. The victim is mentally handicapped. However, there has been no offer made by the defendant that the victim's mental or emotional state may have affected his veracity.

Therefore, of the four factors cited herein above, the State respectfully contends there is only one factor that may be favorable to the defendant. That is factor number two. The State can not cite a specific compelling need to protect the child-victim in this case. As discussed herein above, it is a general concern to have a child-victim psychiatrically evaluated. Otherwise, the State respectfully contends that the other three factors come out against granting the defendant's Motion.

### **CONCLUSION**

Based on the arguments set out herein above, the State respectfully requests that this Honorable Court deny the defendant's Motion for Order Compelling Evaluation of Alleged Victims.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Rape Shield Law NRS 50.090**

CODE

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Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

## **I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

## **III. ARGUMENT**

NRS 50.090 provides:

In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecution or victim.

This is Nevada's so-called Rape Shield law, the purpose of which is to reverse the common law that allowed inquiry into the sexual history of the victim, protect sexual assault victims from degrading and embarrassing disclosures of intimate details of their private lives, and to encourage sexual assault victims to report sexual assaults. See generally, Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985). Additionally, the Supreme Court of Nevada has held in Miller v. State, 105 Nev. 497, 779 P.2d 87 (1989), that this statute does not preclude cross-examination of the sexual assault victim concerning prior false reports of sexual assault the victim made. Therefore, if there is information in the record before this Honorable Court concerning evidence that Shane G. made any prior false allegations of sexual assault, this Honorable Court would not be precluded from releasing on the basis of this statute.

The Legislature has provided an additional exception to the Rape Shield Statute in NRS 48.069 which allows the defendant to present evidence of any previous sexual conduct of the victim of the crime of sexual assault to prove that the victim consented to that sexual assault. This statute sets out a detailed procedure that the defendant must follow which leads to a hearing before this Honorable Court to determine if the proffered evidence is relevant to the issue of consent and is not required to be excluded under NRS 48.035 on the basis of prejudice, confusion, or a waste of time.

**II. CONCLUSION**

Based on the discussion herein above, the State respectfully contends that release of any portion of the report before this Honorable Court which relates to the past sexual activities of Shane G., the victim, is improper under NRS 50.090, unless that information is relevant to the victim's having made a false report of sexual assault in the past or to the issue of consent to the sexual assault in the instant case.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Rape Shield Law II**

CODE  
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Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

NRS 48.069 provides that:

In any prosecution for sexual assault or for attempt to commit or conspiracy to commit a sexual assault, if the accused desires to present evidence of any previous sexual conduct of the victim of the crime to prove the victim's consent:

1. The accused must first submit to the court a written offer of proof, accompanied by a sworn statement of the specific facts that he expects to prove in pointing out the relevance of the facts to the issue of the victim's consent.
2. If the court finds that the offer of proof is sufficient the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the victim regarding the offer of proof.
3. At the conclusion of the hearing, if the court determines that the offered evidence:
  - (a) Is relevant to the issue of consent; and
  - (b) Is not required to be excluded under NRS 48.035, the court shall make an order stating what evidence may be introduced by the accused and the nature of the questions which he is permitted to ask. The accused may then present evidence or question the victim pursuant to the order.

NRS 50.090 provides that:

In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

A thoughtful discussion of Nevada's rape shield law, and the rationale behind it, is contained in Lane v. Second Judicial District Court, 104 Nev. 427 (1988). In that case the Nevada Supreme Court stated:

Nevada's rape shield law recognizes that there may be no relationship between prior sexual conduct and the victim's ability to relate the truth,

and that whether a victim has previously consented to sexual activity under different circumstances may have little or no relevance to the issue of her consent to the activities which resulted in the rape prosecution. Moreover, the rape shield law acknowledges that such evidence tends to distract and inflame the jury and carries with it the danger of unduly prejudicing the truth finding process. See Summit v. State, 101 Nev. 159, 163, 697 P.2d 1374, 1377 (1985); State v. Hudlow, 99 Wash.2d 1, 659 P.d 514 (1983); People v. McKenna, 196 Cob. 367, 585 P.2d 275 (1978); comment, evidence .admissibility of the victim's past sexual behavior under Washington's rape evidence law - Washington Revised Code §9.79.150 (1976), 52 Washington Law Review 1011, 1033 (1977) As Justice Mowbray recently explained, [s]uch [rape shield] laws have generally been designed to reverse the common law rule applicable in rape cases, that use of evidence of a female complainant's general reputation for morality and and chastity was admissible to infer consent and also to attack credibility generally. Thus, for example, it has been held: 'It is a matter of common knowledge that the bad character of man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.' State v. Sibley, 131 Mo. 519, 33 S.W. 167,17]. (1895), quoted in State v. Brown, 636 S.W.2d 929, 933 n.3 (Mo. 1982), cert. denied, subnom., Brown v. Missouri, 459 U.S. 1212, 103 S.Ct. 1207, L.Ed.2d 448 (1983) Such statutes as Nevada's have been described as 'directed at the misuse of prior sexual conduct evidence based on this antiquated and obviously illogical premise.' State v. Hudlow, 99 Wash.2d 1, 659 P.2d 514, 519 (1983). ~ also, People v. McKenna, 196 Cob. 367, 585 P.2d 275, 278 (1978). An additional purpose of such statutes is 'to protect rape victims from degrading and embarrassing disclosures of intimate details about their private lives.' 124 Cong.Rec. at H11945 (1978), quoted in Doe v. United States, 666 F.2d 43, 45 (4th Cir. 1981) Finally, [the restrictions placed on the admissibility of certain evidence by the rape-shield laws will, it was hoped, encourage rape victims to come forward and report the crimes and testify in court protected from unnecessary indignities and needless probing into their respective sexual histories. State v. Lemmon, 456 A.2d 261, 264 (R.I. 1983) Summit v. State, 101 Nev. at 161, 697 P.2d at 1375.

### CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court ORDER that the defendant be precluded from introducing any evidence of any previous sexual conduct of the victim without having first satisfied the procedural requirements of NRS 48.069 and 50.090.

**Remand Intelligent Waiver of Prelim**

CODE

Richard A. Gammick

#001510

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(775) 328-3200

Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK

District Attorney

Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)

Deputy District Attorney

**POINTS AND AUTHORITIES**

## **I. STATEMENT OF THE CASE**

## **II. STATEMENT OF THE FACTS**

## **III. ARGUMENT**

NRS 171.208 states that:

If a preliminary examination has not been had and the defendant has not unconditionally waived the examination, the district court may for good cause shown at any time before a plea has been entered or an indictment found remand the defendant for preliminary examination to the appropriate justice of the peace or other magistrate, and the justice or other magistrate shall then proceed with the preliminary examination as provided in this chapter.

The courts have held that the absence of a preliminary examination or the absence of an intelligent waiver of a preliminary examination may be called the attention of the district court at any time prior to the entry of plea. The defense has made such a motion before this court.

The trial court may exercise its discretion as to what constitutes good cause. If a court fails to consider the defendant's motion for remand or improperly denies such motion, the Supreme Court held that the defendant's subsequent plea of not guilty on the arraignment does not act to waive his right to preliminary examination.

The case law does not clarify what test the court should apply to find "good cause." In Fleming v. Sheriff, Clark County (Nev.1979) 95 Nev. 452, 596 P.2d 243, the Defendant made a plea bargain with the State in which he offered to plead guilty to one count of sexual assault and in exchange the State offered to dismiss two counts. But after the waiver, the defendant was informed by new counsel that he was ineligible for probation. The defendant did not know the consequences of his plea bargain at the time that he made it. Therefore, he requested the matter be remanded. The court denied his motion. Then the defendant pled not guilty.

The court held that "we believe that where, as here, preliminary examination is waived as a condition of an aborted plea bargain, "good cause" as contemplated by NRS 171.208 exists." The ruling does not explain why good cause was found. Was the court's decision based on the fact that the defendant didn't understand the consequences of the plea bargain? The reasoning is not stated. The court

may have been making a statement of black letter law - that anytime before plea is taken, a defendant is entitled to remand for preliminary hearing. If so, then the court must remand the case to justice court.

In Sturrock v. State, 95 Nev. 938, 604 P.2d 341 (Nev. 1979), the court refused to let a defendant plead not guilty in district court after he refused a plea bargain in district court. The defendant was not further advised of his rights pursuant to NRS 171.196 granting him a preliminary examination. The high court stated, "But, when such an agreement is not consummated, the validity of the waiver is vitiated, and it is incumbent upon the district court to absolve appellant of the adverse consequences of the aborted plea bargain. (citations) The court was thus obligated to inform appellant of his right to a preliminary examination before permitting him to enter a plea." The effect of the district court's error was that appellant forfeited his opportunity to exercise the statutory right to a preliminary examination. The court further held that appellant had a clear right to a preliminary hearing, and that the failure of the defense counsel to seek extraordinary relief via a writ and was deemed to have waived his objection to the error.

Due to the fact that an aborted plea bargain is the basis upon which the defendant is seeking remand, it does not appear that good cause exists in this case to deny remand to the defendant. Therefore, the State has stipulated for remand in this case.

II.

**CONCLUSION**

Therefore based on the facts and the law in this case, the State concurs in the Defense's request for remand.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Repeal of Legislation – Effect**

CODE 2645  
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(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

---

OPPOSITION TO MOTION TO DISMISS

COMES NOW, the State of Nevada, by and through counsel, RICHARD A. GAMMICK, Washoe County District Attorney, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this Opposition To Motion To Dismiss. This Opposition is supported by these Points and Authorities, any papers and pleadings filed herein, and any argument or evidence which may be presented at a hearing on this matter.

POINTS AND AUTHORITIES

The defendant argues that the legislative enactment of NRS 453.332, in 1983, repealed, by implication, NRS 453.323. The United States Supreme Court, in United States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198 (1979), reaffirmed that it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." Batchelder, 442 U.S. at 122, 99 S.Ct. at 2203. (Citations omitted.) "Rather, the legislative intent to repeal must be manifest in the 'positive repugnancy between the provisions.'" Batchelder, 442 U.S. at 122, 99 S.Ct. at 2203. (Citations omitted.) The Supreme Court found that the penalty provisions at issue were fully capable of coexisting because they applied to

convictions under different statutes. Batchelder, 442 U.S. at 122, 99 S.Ct. at 2203. See, also, Thorpe v.

Schooling, 7 Nev. 15 (1871):

[R]epeals by implication are not favored; and if it be not perfectly manifest, either by irreconcilable repugnancy, or by some other means equally indicating the legislative intention to abrogate a former law, both must be maintained.

Thorpe v. Schooling, 7 Nev. at 17-18.

The statutes at question here do not contain provisions that are so repugnant. Indeed, the Nevada Supreme Court, in Paige v. State, 116 Nev. Adv. Op 21 (2000), recently found that "NRS 453.321, NRS 453.323(1), and NRS 453.332 are part of an overall statutory scheme that is designed to supplement, not supplant, the intended coverage of one another." Paige v. State, 116 Nev Adv Op 21. Clearly, the enactment of NRS 453.332 did not repeal nor supplant NRS 453.323.

For each and all of the above reasons, the defendant's motion must be denied.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

05315743

**Requisition Application for – Affidavits and Certification**

APPLICATION FOR REQUISITION

DISTRICT ATTORNEY OF WASHOE COUNTY

-----

TO THE GOVERNOR OF THE STATE OF NEVADA:

I have the honor herewith to make application for a requisition upon the Governor of the State of California for the arrest and rendition of \_\_\_\_\_ who is charged in this county with the crimes of COUNT I: \_\_\_\_\_, a violation of NRS \_\_\_\_\_ and NRS \_\_\_\_\_, a felony; and COUNT II: \_\_\_\_\_, as defined in NRS \_\_\_\_\_, and who, as appears from the accompanying proof, and particularly the annexed affidavit of \_\_\_\_\_ (a responsible person and entitled to credit), is a fugitive from justice of this state, and has taken refuge in the State of California.

I HEREBY CERTIFY:

1. That the full name of the person for whom requisition is asked is \_\_\_\_\_.
2. That the best available identification description of said fugitive is as follows:  
\_\_\_\_\_, \_\_\_\_\_ tall \_\_\_\_\_ pounds, DOB: \_\_\_\_\_, POB: \_\_\_\_\_, SSN: \_\_\_\_\_.
3. That I have carefully examined the case, and

verily believe that the facts stated in the accompanying proof are true and that the fugitive is guilty of the crime charged; that the ends of public justice require that the fugitive be brought back to this state for trial at the public expense; that I have as I believe sufficient evidence to secure conviction; that the charge was preferred and this application is made in good faith and not for the purpose of the collection of a debt, the enforcement of a civil remedy or any other private purpose and, when such offender is returned to this state, the criminal proceedings will not be used for any of said objects, but that it is my intention to diligently prosecute said fugitive for the crimes with which charged.

4. That no other application has been made for a requisition for the fugitive growing out of the transaction from which the charges herein originated.

5. That the fugitive is now under arrest in the State of \_\_\_\_\_, and the proceedings upon which such arrest is based, and the grounds for my belief relative thereto are that communication was received from the San Francisco Police Department that the defendant/fugitive is in custody and refuses to waive extradition for his return to the State of Nevada.

6. That the fugitive is properly charged in due form in accordance with the laws of this State, with the crimes of COUNT I: \_\_\_\_\_, a violation of NRS \_\_\_\_\_ and NRS \_\_\_\_\_, a felony; and COUNT II: C \_\_\_\_\_, as defined in NRS \_\_\_\_\_ committed in the County of Washoe, State of Nevada, on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_; that the fugitive was personally and physically present in this state at the time of the commission of said crimes, and to avoid arrest and prosecution, fled from the justice of this state.

7. That the definitions of the aforesaid crimes of which the fugitive is charged and the punishment therefor, as prescribed by the laws of this State in the Nevada Revised Statutes, are attached hereto and incorporated herein by reference.

8. That in support of this application, the following papers, all of which are authentic and properly authenticated in accordance with the laws of this State, are hereto annexed:

- a. Amended Information
- b. Affidavit in support of Arrest Warrant
- c. Fingerprint Cards
- d. Bench Warrant
- e. Affidavit of \_\_\_\_\_
- f. Photograph of Fugitive

That I have carefully examined said papers; that all papers purport to be copies, together with all endorsements and filing marks to be found on the originals thereof; that the annexed papers include all the proofs upon which the extradition proceedings against the fugitive is based, and that the duplicate copy of the petition submitted herewith, together with all papers thereto attached and all endorsements therein and certifications thereof are exact counterparts of this petition and attachments.

///

I nominate and propose the name of Richard Kirkland and/or his authorized agent for designation as agent of the state to return the fugitive and represent that he is the proper person for such designation; that he is a public officer, to wit: Sheriff of Washoe County and/or his authorized agent; that he has no private interest in the arrest of the fugitive other than in the discharge of his duty as such officer, and that he has not been supplied with private funds for the purpose of defraying expenses, or otherwise in connection with the extradition of the fugitive.

Respectfully submitted this \_\_\_\_\_ day of \_\_\_\_\_,  
1999.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney  
STATE OF NEVADA    )  
                          ) ss.  
COUNTY OF WASHOE    )

does hereby swear under penalty of perjury that the  
assertions of this affidavit are true.

That he is a duly qualified and acting Chief Deputy District Attorney of the County of Washoe, State of Nevada; that he has read the foregoing application for requisition and knows the contents thereof; and that the same is true of his own knowledge, excepting as to matters therein stated on information and belief, and as to those matters he believes it to be true.

\_\_\_\_\_

Subscribed and sworn to before me this

\_\_\_\_\_ day of \_\_\_\_\_, .

\_\_\_\_\_  
NOTARY PUBLIC

C E R T I F I C A T I O N

STATE OF NEVADA )  
                          ) ss.  
COUNTY OF WASHOE )

I, AMY HARVEY, the duly elected and qualified and Clerk of Washoe County, State of Nevada, do hereby certify that the annexed and foregoing copy of the Bench Warrant is a full, true and correct copy of the original Bench Warrant which now remains issued and of record out of said Court on the 9th day of June, 1999, that said Bench Warrant is still in full force and effect. I do further certify that the annexed and foregoing copy of the Amended Information is a full, true and correct copy of the original Amended Information duly and regularly issued and filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on the 29th day of January, 1999, that said Amended Information is now on file in said Court; that no order has been made to dismiss said Amended Information and the same is now in full force and effect; that I am custodian of the original Amended Information and that I have compared said copy with said original.

I FURTHER CERTIFY, that RICHARD A. GAMMICK is the District Attorney of the aforesaid County and State; that \_\_\_\_\_ is a Chief Deputy District Attorney of said County and State; that \_\_\_\_\_ is a presiding Judge of the District Court of said County and State (which is a court of record having a seal), and full faith and credit are due to his/her official acts as such; that each of the above-named \_\_\_\_\_ officers was, at the time of signing the annexed instruments, which I have examined, such officers duly elected or appointed, qualified and acting, and duly authorized by law to execute the same. I further certify

that I am well acquainted with the handwriting of each of the above-named officers, and do verily believe the signatures to the attached instruments are genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of Washoe County, State of Nevada, this \_\_ day of \_\_\_\_\_, .

County Clerk and ex-officio Clerk  
of the Second Judicial District  
Court in and for the County of  
Washoe, State of Nevada



STATE OF NEVADA )  
 ) ss.  
COUNTY OF WASHOE )

I, AMY HARVEY, County Clerk of the County of Washoe, State of Nevada, and ex officio Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada (which court is a court of record having a seal, which is annexed hereto), do hereby certify that \_\_\_\_\_ whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, a Judge of the District Court aforesaid and was duly commissioned, qualified and authorized by law to execute said certificate; and I do further certify that the signature of the Judge above named to the certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the Seal of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, this \_\_\_ day of \_\_\_\_\_, 19\_\_.

Clerk of the County of Washoe,  
State of Nevada, and ex-officio  
Clerk of the Second Judicial  
District of Court in and for the  
County of Washoe, State of Nevada

APPROVED AS TO FORM AND VALIDITY THIS \_\_DAY OF \_\_\_\_\_, .

Attorney General of the State of Nevada

By  
Deputy Attorney General

Beverly Saucedo  
Agreement Coordinator  
Office of the Attorney General  
100 N Carson St  
Carson City, NV 89701

RE: State of Nevada vs.

Dear Beverly:

Enclosed in quadruplicate are Application of Requisition papers on the above named defendant to be forwarded to Governor Guinn for his signature.

The defendant is in the custody of the San Francisco Police Department, at the San Francisco County Jail, located in San Francisco, California, being held on our Warrant.

We would appreciate the signing and forwarding of these documents in order that the request for extradition may be acted upon by the Governor of the State of California.

Thank you for your assistance and cooperation.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

Enc.

**Request for Submission and Order**

CODE  
Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for the Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

,

Defendant.

\_\_\_\_\_  
REQUEST FOR SUBMISSION

The State hereby requests that the Motion to \_\_\_\_\_ filed on \_\_\_\_\_,  
be submitted to the Court for a decision.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

CODE 3060  
Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89502-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

ORDER GRANTING MOTION TO AMEND INFORMATION

On \_\_\_\_\_, the State filed a Motion to \_\_\_\_\_. No opposition having  
been filed, and good cause appearing, the Motion is hereby granted. NRS 173.095.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
DISTRICT JUDGE

**Res Gestae**

CODE

Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

## **POINTS AND AUTHORITIES**

### **I. STATEMENT OF THE CASE**

### **II. STATEMENT OF THE FACTS**

### **III. ARGUMENT**

Once a defendant pleads not guilty in a criminal case, he puts all of the elements of the offense at issue. Sonner v. State, 112 Nev. Adv. Op. 161 at 8, 930 P.2d 707, 714 (1996) *citing* State v. Foster, 229 Kan. 362, 623 P.2d 1360, 1363 (1981). As this Court is well aware, the State has the burden to prove each and every one of these elements beyond a reasonable doubt.

Further, the State has the right to present all facts necessary to prove the crime charged when the facts are linked to a chain of events which support that crime. Dutton v. State, 94 Nev. 461, 464, 561 P.2d 856, 858 (1978); *see also* Bletcher v. State, 111 Nev. 1477, 907 P.2d 978 (1995) and Shults v. State, 98 Nev. 742, 616 P.2d 388 (1980). Finally, relevant evidence is admissible unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. NRS 48.035 (emphasis added).

Arguably, this evidence will also be prejudicial to LEBEAU. However, the prejudicial effect of this evidence will not outweigh, let alone substantially outweigh, the probative value of Debra Walker's testimony. The fact is that all evidence presented in a criminal trial against a criminal defendant is prejudicial but is permitted when it is crucial "...in ascertaining the truth." Browne v. State, 113 Nev. Adv. Op 33 at 7, 933 P.2d 187, 192 (1997).

**Res Gestae II**

CODE  
Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .  
RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada  
By \_\_\_\_\_  
(DEPUTY)  
Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**II. STATEMENT OF THE FACTS**

**III. ARGUMENT**

ANALYSIS

Nevada's res gestae rule is embodied in NRS 48.035(3):

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

Under the Complete Story of Crime Doctrine, the evidence of other crime(s) may be introduced at trial when the other crime(s) is/are interconnected to the act in question such that a witness cannot describe the act in controversy without referring to the other crime(s). Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992); vacated 114 S.Ct. 1280 (1994); modified 113 Nev. Adv. Op. 6 (January 3, 1997). The State is entitled to present a full and accurate account of the circumstances of the commission of a crime, and if such an account also implicates the defendant in the commission of other crimes, the evidence is nevertheless admissible. Kelly v. State, 108 Nev. 545, 550, 837 P.2d 416 (1992); Brackeen v. State, 104 Nev. 547, 553, 763 P.2d 59 (1988).

Even if the evidence were not admissible as part of the res gestae, it is nonetheless admissible pursuant to NRS 48.045(2) which provides the following:

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

The use of the words "such as" makes it clear that the above list of theories is illustrative only and not exhaustive.

Under NRS 48.045(2), evidence of a prior bad act is admissible if (1) the prior act is relevant to the crime charged; (2) the prior act is proven by clear and convincing evidence; and (3) the

evidence is more probative than prejudicial. See, Felder v. State, 107 Nev. 237, 240, 810 P.2d 755 (1991); Berner v. State, 104 Nev. 695, 697, 765 P.2d 1144 (1988).

NRS 48.015 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

Many cases support the proposition that prior acts evidence should, whenever possible, be presented in the State's case-in-chief. U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 531 (4th Cir. Ct. of App. (1985)).

#### CONCLUSION

If the Court deems the aforementioned evidence admissible as res gestae, then no Petrocelli hearing will be required. If, however, the Court concludes that said evidence is not admissible pursuant to the res gestae rule, then the State would request that a Petrocelli hearing be conducted to determine the admissibility of the prior bad act evidence pursuant to NRS 48.045(2).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney

**Res Gestae III**

CODE 2245  
Richard A. Gammick  
#001510  
P.O. Box 30083  
Reno, NV 89520-3083  
(775) 328-3200  
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
  
IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

MOTION OF THE INTRODUCTION OF EVIDENCE  
OF CERTAIN OTHER CRIMES, WRONGS, OR ACTS

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this Motion for the Introduction of Evidence of Certain other Crimes, Acts, or Wrongs committed by the defendant named herein above. This Motion is supported by all papers and pleadings on file herein, the attached Points and Authorities, the hearing conducted in accordance with Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) and Armstrong v. State, 110 Nev. 1322, 885 P.2d 600 (1994), and any oral argument this Honorable Court may entertain on this Motion.

DATED this \_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

**III. ARGUMENT**

A. The Res Gestae Doctrine.

NRS 48.035(3) provides:

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

This statute sets out the *res gestae* exception to the prohibition against introducing other crimes or acts against the defendant. The Supreme Court of Nevada recognized this exception in Allan v. State, 92 Nev.

318, 549 P.2d 1402 (1976) and held that:

...when several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction, and when full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme.

See Allan, supra. at 92 Nev. at 321, 549 P.2d at 1404. Further, the Court has held in State v. Shade, 111 Nev. 887, 900 P.2d 327 (1995) that:

In reading NRS 48.035 as a whole, it is clear that where the *res gestae* doctrine is applicable, the determinative analysis is not weighing of the prejudicial effect of the evidence of other bad acts against the probative value of that evidence. If the doctrine of *res gestae* is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

See Shade, supra. at 900 P.2d at 331. In Sutton v. State, 114 Nev. 1327, 972 P.2d 334 (1998), the Supreme Court cited Allan, supra. and Shade, supra., with approval in upholding the *res gestae* doctrine.

The State respectfully contends that Ms. \_\_\_\_\_ cannot tell the entire story of this kidnapping without referring to other crimes and acts which the defendant committed during the kidnapping and on previous occasions during their stormy two and a half year relationship. She must be allowed to testify to the previous acts of violence the defendant visited upon her in order to establish the terror she felt during the ride he took her on late on October 10, 1999, and early on October 11, 1999. Moreover, she must be allowed to testify to the defendant's repeated threats to kill her and her daughter while they were on this ride of terror. Additionally, she must be able to testify to the repeated acts of domestic battery the defendant committed on her prior to and during this ride. Also, she must be allowed to testify that in their room prior to their departure on this ride, the defendant had tried to intimidate her with a leather belt and had held her on the bed against her will. Finally, she should be allowed to testify that her daughter, Stephanie, was present during this ride and was, in effect, a victim of second degree kidnapping as well. All of this testimony is highly probative of the issue of whether or not the defendant held Ms. Horner against her will during the time he had her in the automobile. Additionally, she cannot tell the full terrorizing story of this crime without the necessary references to all of these uncharged crimes or acts of the defendant.

Therefore, the State respectfully moves this Honorable Court to admit the proffered testimony during its case in chief on the basis of the well founded *res gestae* doctrine.

B. Evidence of the Defendant's Intent.

NRS 48.045(2) provides in pertinent part:  
Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of...intent,....

**IV. CONCLUSION**

Based upon the legal arguments and legal precedents and authority cited herein above, the State respectfully contends that the proffered evidence of uncharged crimes, wrongs, or acts of the defendant is admissible under the *res gestae* doctrine set out in NRS 48.035 and to prove the intent and criminal nature of the defendant's acts as exceptions to the prohibitions of NRS 48.045(2). For these reasons, the State respectfully moves this Honorable Court for admission of the proffered evidence in its case in chief.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_  
Deputy District Attorney

**Robbery Recent Possession of Stolen Property**

CODE

Richard A. Gammick

#001510

P.O. Box 30083

Reno, NV 89520-3083

(775) 328-3200

Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

v.

Case No. CR

,

Dept. No.

Defendant.

\_\_\_\_\_ /

**MOTION TITLE**

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and \_\_\_\_\_, Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this \_\_\_\_ day of \_\_\_\_\_, .

RICHARD A. GAMMICK

District Attorney

Washoe County, Nevada

By \_\_\_\_\_

(DEPUTY)

Deputy District Attorney

**POINTS AND AUTHORITIES**

**I. STATEMENT OF THE CASE**

## II. STATEMENT OF THE FACTS

### III ARGUMENT

The defense cites several cases from other jurisdictions for the proposition that possession of stolen property cannot support a robbery conviction and "the evidence must discount the possibilities that a robbery was not committed and that someone else committed the robbery". This position is not supported by Nevada law. As stated herein above, the State "is not required to negate all inferences which might explain" a defendant's conduct. Kinsey v. Sheriff, supra. Review of the cases relied upon by the defense fail to provide any guidance in determining "probable cause" in the instant case.

In People v. Hemphill, 594 N.E.2d 1279 (Ill. App. 1992), a case involving charges of murder and robbery of two people, one robbery conviction was reversed based upon evidence that one victim did not own the property stolen. The evidence showed that she was only a visitor to the residence where she was murdered. The murder convictions were upheld.

In Wells v. People, 592 P.2d 1321 (Colo. 1979), the robbery conviction was reversed based upon the failure of the trial court to properly instruct the jury on the issue of specific intent. However, the court did observe that rational inferences regarding possession of stolen property may be drawn by the trier of fact stating:

Importantly, the unexplained, exclusive possession of recently stolen goods creates only an inference that the possessor was the robber. Unlike a presumption of law, which mandates a conclusion of the part of the jury, an inference merely affords the evidence its natural probative force, which the jury is free to accept or reject. The weight or force to be given the inference rests entirely with the jury. VanStraaten v. People, supra. Therefore, an instruction or unexplained and exclusive possession of recently stolen property should make the foregoing emphatically clear so as not to confuse the jury as to its function.

Another important aspect of the inference is the time lapse between the robbery and the discovery of the defendant's possession of the stolen property. The longer the intervening interval the weaker the inference. Pendergrast v. United States, supra; Cloud v. United States, 361 F.2d 627 (8th Cir. 1966).

Wells v. People, 592 P.2d 1325 (Colo. 1979).

Another case relied upon by the defense is Jones v. State, 319 S.E.2d 18 (Ga. App. 1984). There the Georgia Appellate Court also found that the defendant's possession of stolen property was

circumstantial evidence supporting an inference that the defendant was one of the persons that committed the crime.

**CONCLUSION**

DATED this \_\_\_\_\_ day of \_\_\_\_\_,

RICHARD A. GAMMICK  
District Attorney  
Washoe County, Nevada

By \_\_\_\_\_

Deputy District Attorney