EXHIBIT "A"

IND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID STANTON
Deputy District Attorney
Nevada Bar #003202
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

THOMAS WILLIAM RANDOLPH,
ID# 2703406

Defendant(s).

Case No. C250966
Dept. No. ~~XV~~ XXIII

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, THOMAS WILLIAM RANDOLPH, accused by the Clark County Grand Jury of the crime(s) of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480); MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165); and BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Felony - NRS 205.060), committed at and within the County of Clark, State of Nevada, on or about the 8th day of May, 2008, as follows:

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COUNT 1 - CONSPIRACY TO COMMIT MURDER

did then and there meet with Michael James Miller and between themselves, and each of them with the other, wilfully and unlawfully conspire and agree to commit the crime of MURDER, and in furtherance of said Conspiracy, Defendant and Michael James Miller did commit the acts as set forth in Counts 2 and 3, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

did then and there willfully, unlawfully, feloniously, and without authority of law, and with malice aforethought, kill SHARON CAUSSE RANDOLPH, a human being, in the following manner, to wit; by shooting at and into the head of SHARON CAUSSE RANDOLPH with a firearm, the actions of Defendant THOMAS RANDOLPH and his accomplice Michael James Miller resulting in the death of the said SHARON CAUSSE RANDOLPH, said killing having been (1) willful, deliberate and premeditated; and/or (2) committed by Defendant and/or his accomplice lying in wait to commit the killing; and/or (3) committed during the perpetration or attempted perpetration of robbery and/or burglary, said Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by directly committing the act; and/or (2) by Defendant conspiring with Michael James Miller, with the specific intent that a killing occur, whereby each is vicariously liable for the foreseeable acts of the other made in furtherance of the conspiracy; and/or (3) by Defendant and Michael James Miller aiding or abetting each other, with the specific intent that a killing occur, by counseling, encouraging, commanding or procuring the other to commit the offense, by Defendant planning the killing of SHARON CAUSSE RANDOLPH with accomplice Michael James Miller; the Defendant thereafter being present outside the home when SHARON CAUSSE RANDOLPH entered the home she shared with Defendant; the Defendant's accomplice, Michael James Miller, acting in the role of a burglar, shot SHARON CAUSSE RANDOLPH in the head pursuant to the agreement and plan of Defendant and his accomplice Michael James Miller.

COUNT 3 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously enter, while in possession of a deadly weapon, to-wit: a firearm, with intent to commit larceny and/or a felony, to-wit: robbery and/or murder, that certain building occupied by SHARON CAUSSE RANDOLPH, located at 6517 Rancho Santa Fe Drive, Las Vegas, Clark County, Nevada, the Defendant being responsible under one or more of the following principles of criminal liability, to wit: (1) by Defendant entering the residence at 6517 Rancho Santa Fe Drive with the intent to commit murder, a felony, the Defendant obtaining a firearm while inside of the said residence; and/or (2) the Defendant aiding or abetting in the commission of the crime by counseling, encouraging, commanding or procuring another to commit the offense, by planning the murder of SHARON CAUSSE RANDOLPH with accomplice Michael James Miller; the accomplice Michael James Miller, pursuant to the agreement with Defendant, entering the residence at 6517 Rancho Santa Fe Drive with intent to commit robbery and/or murder; the accomplice obtaining a firearm while inside of the residence; the Defendant and accomplice Michael James Miller encouraging one another throughout by actions and words; the Defendant and accomplice Michael James Miller acting in concert throughout, both Defendant and Michael James Miller intending to commit burglary.

COUNT 4 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill MICHAEL JAMES

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MILLER, a human being, by Defendant shooting the victim in the head and body with a deadly weapon, to-wit: firearm.

DATED this 6th day of January, 2009.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
DAVID STANTON
Deputy District Attorney
Nevada Bar #003202

ENDORSEMENT: A True Bill

Foreperson, Clark County Grand Jury

Names of witnesses testifying before the Grand Jury:

O'KELLEY, DEAN LVMPD – HOMICIDE

BARTLETT, MARK

BEYER, COLLEEN

MILLER, VITTA

MILLER, CLIFTON, JR.

Additional witnesses known to the District Attorney at time of filing the Indictment:

08AGJ085X/08F19497X/mj
LVMPD EV# 0805083131
(TK4)

EXHIBIT "B"

NISD
DAVID ROGER
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
THOMAS WILLIAM RANDOLPH, #2703406,
Defendant.

CASE NO: C250966
DEPT NO: XXIII

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through DAVID L. STANTON, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033, and declares its intention to seek the death penalty at a penalty hearing in the instant case. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. *The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.* Nev. Rev. Stat. §200.033(12).

In the instant case, Defendant is charged in Counts 2 and 4 of the Indictment with Murder with Use of a Deadly Weapon for the killings of Sharon Causse Randolph and Michael James Miller, respectively. The State will rely on the jury's verdicts for Counts 2 and 4 to prove this aggravating circumstance against Defendant.

2. *The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value. NRS 200.033(6).*

The Defendant, either by himself or in conjunction with his co-conspirator, Michael James Miller, murdered SHARON CAUSSE RANDOLPH for the purpose of receiving proceeds from life insurance policies taken out on the life of SHARON CAUSSE RANDOLPH, wherein the Defendant was the named beneficiary and/or Defendant was to be the ultimate beneficiary of the life insurance proceeds. Those insurance polices include, but are not limited to, the following: (1) Protective Life (ZL9938662); (2) Monumental Life Insurance Company (MZ45000300-194); (3) Stonebridge Life (82AK3W4465); and (4) Prudential Financial (L4286728Y). Copies of each of these insurance policies have been provided to defense counsel. The investigation regarding the actual number of policies is ongoing, and any additional policies will be provided to the defense if and when discovered.

3. *The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of: (b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony. NRS 200.033(2).*

On or about May 30, 1989, Defendant Thomas Randolph pleaded guilty to witness tampering, a third-degree felony, in Second District Court in Farmington, Utah. On or about June 27, 1989, Randolph was sentenced to up to five (5) years in prison and fined $10,000 by Judge Douglas L. Cornaby on the witness tampering conviction. The guilty plea and conviction arose out of Defendant Randolph's solicitation of an undercover police agent to have a trial witness, Eric Tarantino, killed. Defendant Randolph, between December 1988 and January 1989, while awaiting trial on a murder charge, discussed with Davis County Jail cell mate Steve Williams ways to stop Tarantino from testifying in Randolph's murder trial. Tarantino had already testified against Randolph in a preliminary hearing. Williams reported his conversations with Randolph to the Davis County Sheriff's office, and officials worked with Williams to record several conversations he had with Randolph. Later, Williams was let out of jail on the pretext of an early release. Randolph made several telephone calls to a hotel room where Williams was staying after Williams was released, all of which were recorded. During one of the calls, Randolph was asked if he was sure he

"wanted this guy whacked," and Randolph responded affirmatively. Williams later met with Randolph's girlfriend, Wendy Moore, in Layton, Utah, and Moore (at Randolph's direction) provided Williams with the title to an automobile as a down payment to carry out the slaying of Tarantino. Tarantino ultimately testified against Randolph in a murder trial in which Randolph was charged with the November 7, 1986 killing of Randolph's then-wife, Rebecca Gault Randolph.

DATED this 4th day of February, 2009.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ David L. Stanton
DAVID L. STANTON
Chief Deputy District Attorney
Nevada Bar #003202

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 4th day of February, 2009, by facsimile transmission to:

GABRIEL GRASSO, ESQ.
FAX: (702) 868-5778

BY: /s/ Jennifer Georges
Secretary for the District Attorney's Office

08F19497X/jg/MVU

EXHIBIT "C"

9/23

MOT

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963
200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

THOMAS WILLIAM RANDOLPH, #2703406

Defendant.

Case No. C250966

Dept No. XXIII

NOTICE OF MOTION AND MOTION TO ADMIT EVIDENCE OF PRIOR BAD ACTS

DATE OF HEARING: 12-04-09
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through ROBERT J. DASKAS, Chief Deputy District Attorney, and files this Notice of Motion and Motion to Admit Evidence of Prior Bad Acts.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XXIII thereof, on Friday, the 4th day of December, 2009, at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED this 23rd day of September, 2009.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Robert J. Daskas
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963

INTRODUCTION

Defendant Thomas Randolph has been married six times.[1] Four of his ex-wives are dead. Randolph's sixth wife, Sharon Cause Randolph, was killed by a single gunshot wound to her head on May 08, 2008. She was murdered in the couple's home with Defendant's gun. Sharon is one of two victims in the instant case. The other victim is Michael Miller, an accomplice Randolph solicited to kill his wife. Miller was then killed by Randolph.

In short, Defendant Randolph conspired with Michael Miller to kill Defendant's wife, Sharon, during a staged "burglary" of the home Randolph shared with his wife. Defendant Randolph, in turn, killed Michael Miller and claimed Miller was an intruder. Randolph killed Sharon so he could collect life insurance proceeds. Randolph killed Miller to eliminate the possibility of anyone ever testifying against him regarding the murder of his wife. As outlined below, Randolph learned from a previous mistake.

Incredibly, Sharon is neither Randolph's first wife; nor is she the first of Randolph's wives to die during their marriage; nor is she the first of Randolph's wives to die of a

[1] (1) Kathryn Randolph; (2) Becky Gault Randolph (deceased); (3) Leona Randolph (deceased); (4) Gayna Randolph; (5) Frances Randolph (deceased); (6) Sharon Cause Randolph (deceased).

gunshot wound to the head; nor is she the first of Randolph's wives on whose death Randolph collected life insurance proceeds; nor is she the first of Randolph's wives to be named as a homicide victim in a murder prosecution against Randolph. In the mid-1980s, Randolph was charged with the murder of his second wife, Becky Gault, in Davis County, Utah. Becky, like Sharon, died of a gunshot wound to the head. There, as here, Randolph collected hundreds-of-thousands-of-dollars in life insurance proceeds. In that case, as in this case, Randolph befriended someone and then solicited that person to kill his wife. In both cases, Randolph took steps to have his accomplices killed - - in Utah, he failed; in Nevada, he succeeded.

FACTUAL BACKGROUND[2]

On May 08, 2008, Thomas Randolph telephoned 911 at 8:44 p.m. from his residence at 6517 Rancho Santa Fe, Las Vegas, Nevada, to report a home invasion. Randolph explained that he and his wife, Sharon, returned home from dinner and encountered an intruder in their home. Randolph said the intruder shot and killed Sharon, and Randolph, in turn, shot and killed the intruder. The intruder, Michael Miller, was a "handyman" whom Randolph had known for approximately six months.

The Relationship between Randolph and Miller:

Michael Miller moved to Las Vegas in December 2007 and was staying with an uncle and aunt. Randolph met Miller in January 2008 outside a convenience store and struck up a friendship. Miller, according to Randolph, performed odd jobs around Randolph's house. According to Miller's cousin, however, Miller was actually approached by Randolph to sell prescription medication for Randolph (Randolph indeed had multiple prescriptions for pain medication). Miller's cousin saw Miller selling prescription medication over the next several months.

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[2] The facts regarding the murder of Sharon Cause Randolph were outlined for this Court in the State's Opposition to Defendant's Motion to Set Bail, which were gleaned primarily from the grand jury transcripts dated December 16, 2008 and January 06, 2009.

Randolph's Version of Events:

One week after the shootings of Sharon Cause Randolph and Michael Miller, Randolph agreed to meet with Las Vegas Metropolitan Police Department Homicide detectives Dean O'Kelley and Rob Wilson to do a video "re-enactment" of the shootings. The majority of the following facts are gleaned from the 58 minute video, a copy of which was played for the members of the Grand Jury. *See* Grand Jury Transcript, Vol. 1, December 16, 2008, p. 45.

After having dinner together on May 08, 2008, Randolph and his wife returned to their residence at approximately 8:30 p.m. Randolph stopped in the driveway to let his wife out of the car (Randolph explained the garage was too small to enable a passenger to exit), and Randolph watched Sharon enter their residence while he listened to music in their SUV. After a short while, Randolph entered the home. He saw his wife lying face down at the end of the hallway.

Initially, Randolph claimed, he believed Sharon tripped but soon observed "shadows" moving at the end of the hallway. Randolph ducked into a room off the hallway and retrieved a 9mm semi-automatic handgun he had hidden. As he turned around, Randolph claimed he saw a masked man. (Randolph later realized it was Michael Miller, his friend, when the ski mask came off.)

Randolph claimed the intruder was possibly pulling a weapon from his waistband area. Therefore, Randolph fired several shots while he and the intruder were still in the hallway and just a few feet from the door that led into the garage. After shooting, the intruder fell into the garage. Randolph explained he then heard a very loud noise (according to Randolph, it turned out to be a fire extinguisher falling off a refrigerator in the garage). Randolph claimed he was afraid Miller was still alive and possibly shooting at him, so Randolph fired two additional rounds directly into the head of Miller as Miller lay defenseless on the ground. Randolph demonstrated to detectives how he then "cleared" his home to ensure there were no additional suspects. Randolph said he then called 911.

Miller's body was found just inside the garage (just outside the door that leads from

the house into the garage). He was wearing gloves. Located near Miller's body was a full-faced "ski" mask; there were no bullet holes in, or blood on, the mask.

Detectives noted several inconsistencies in Randolph's version of events. These inconsistencies (coupled with motive) convinced authorities - - and later a grand jury - - that Randolph solicited Miller to kill Randolph's wife in a staged burglary; Randolph then ambushed an unsuspecting Miller as he walked into the garage with Randolph; and finally Randolph played the role of hero as he claimed he killed a burglar. These inconsistencies were previously outlined in the State's Opposition to Randolph's Motion for Bail.

Randolph had motive to kill Sharon. They married on March 03, 2007. Randolph had in excess of $400,000.00 in life insurance on Sharon with Randolph named as the beneficiary of those policies. The marriage between Defendant Randolph and Sharon had numerous problems. Randolph left Sharon between five and ten times to go back to his old girlfriend Elizabeth "Lizzy" Lavadour.

THE UTAH CASE[3]

Defendant Randolph lived in Utah in the 1980s. He married Becky Gault Randolph in April 1983. Becky was Randolph's second wife. Becky, like Sharon, would be dead within a few years of her marriage to Randolph.

In 1986, Becky and Randolph separated, and Becky was planning to leave Randolph permanently. In the summer of 1986, Randolph held a gun to Becky's head and told her, "I'm going to kill you."

On November 7, 1986, Becky Randolph was found dead in her residence in Clearfield, Utah. She was killed by a contact range gunshot wound to her right temple from a .380 caliber pistol. She was found lying on her back in bed covered with blankets. There was a pistol in her right hand and a gunshot wound to her right temple. An expended .380 cartridge case was on the floor. Officers noticed a broken basement window; all other doors and windows were secure. Dr. Edwin Sweeney, the pathologist who performed the autopsy

[3] The facts from the Utah case are gleaned from trial transcripts, officers' reports and witness statements. The State would present this evidence at trial (or in a *Petrocelli* hearing) through the testimony of live witnesses, including the investigating detectives, police officers and witness Eric Tarantino.

on Becky's body, opined that Becky's body had been moved after she was shot.

Randolph was the person who "found" Becky dead. Police interviewed Randolph who claimed he last saw Becky alive at 3:30 p.m. on the previous day (November 6, 1986) when they "had words." Around 12 hours later, at 3:11 a.m. on November 7, 1986, Randolph got arrested for DUI. He was booked into jail around 5:36 a.m. and released around 12:22 p.m. on the afternoon of November 7, 1986[4]. He told police he got out of jail and drove to Becky's residence where he discovered her dead body. He said he tried to remove the gun from her hand and touched the barrel in the process. Randolph did not immediately call 911. Instead, he drove to his father's house where his father called police and reported the death at 2:09 p.m. on November 7, 1986. Randolph returned to the scene of Becky's death with his lawyer.

Following Becky's death, a witness came forward who shed considerable light on the circumstances surrounding Becky's death. Eric Tarantino was a former co-worker and friend of Randolph. He met Randolph in 1982 when they both worked at Timberline Cabinets. Randolph was Tarantino's supervisor. The two became friends, and eventually Randolph began asking Tarantino if he would take care of a problem. Randolph later identified the "problem" as his wife, Becky.

Shortly after telling Tarantino about Becky, Randolph was laid off from Timberline Cabinets. Nevertheless, Randolph stayed in touch with Tarantino, and he persisted in his request to have Tarantino kill Becky. In fact, Tarantino switched jobs around February 1983 and Randolph sought employment with - - and was hired by - - the same company a couple months later. It was Tarantino's impression that Randolph was following Tarantino so Randolph could convince Tarantino to kill Becky.

On August 26, 1984, Tarantino witnessed a failed attempt by Randolph himself to kill Becky while making it appear to be an accident. Becky was in a deep sleep in her mobile home she shared with Randolph after taking medication. In Tarantino's presence, Randolph

[4] Dr. Sweeney opined that Becky was killed between 11:30 p.m. and 1:30 a.m. Thus, Randolph had a "window of opportunity" within which to kill Becky.

held a rag over a candle, let it catch fire then left the trailer with his (Randolph's) four-year-old son and Tarantino. Randolph dropped off Tarantino who called 911 and reported the fire[5]. Fire personnel responded, awakened Becky and extinguished the fire. A smoke detector in the residence was not working.

Randolph discussed with Tarantino several plans for killing Becky. Some of the ideas included Becky getting "accidentally" shot when they all went shooting rifles together, drowning Becky, switching out her medication, staging a car accident and others. Significantly, one plan involved a staged burglary in which Becky would be shot by an "intruder." Randolph had a silencer made for a gun and had Tarantino fire it. Randolph was going to use proceeds from life insurance policies he had taken out on Becky's life to compensate Tarantino $10,000.00 for killing Becky. The balance of the life insurance proceeds would go to Randolph.

An investigation revealed that Randolph had in excess of half-a-million dollars in life insurance policies he had taken out on Becky, including $244,000.00 from Farmer's Insurance, $100,000.00 from New York Life, $112,000.00 from Equitable Life Insurance, and $63,840.00 from Equifax Insurance. In fact, Randolph had borrowed money against his own life insurance policy to pay the premiums on Becky's policies to keep Becky's policies current. The policies permitted Randolph to collect if Becky's death was ruled a suicide.

Randolph was arrested and charged with Becky's murder in late 1988.

The Solicitation-To-Kill-a-Witness Case

While awaiting trial on Becky's murder, Randolph was housed in a Davis County, Utah jail. His cellmate was Steve Williams. Randolph solicited Williams to kill Eric Tarantino, a critical witness against him in Becky's murder case. Unbeknownst to Randolph, the "hit man," Steve Williams, was a police informant.

Williams was released from jail in December 1988 on the pretext of an early release. Randolph utilized Randolph's then-girlfriend, Wendy Z. Moore, to act as the liaison between

[5] Tarantino eventually developed a relationship with Becky. He informed Becky of Randolph's plan to kill her, explained the mobile home fire was no accident, and informed her of the life insurance policies Randolph had taken out on her life.

himself (since he was in jail) and the hit man, Williams. Undercover officer Bill McCarthy and informant Steve Williams met with Wendy Moore on a few occasions in a hotel room to discuss the hit. Randolph arranged these meetings. Randolph called the hotel room on one occasion, spoke to undercover officer McCarthy, and agreed he wanted Tarantino "whacked." Randolph negotiated the terms of the hit with undercover officer McCarthy and police informant Williams. Randolph was to provide $2,000.00 to demonstrate good faith, provide an automobile title, and pay an additional $2,000.00 for expenses to carry out the hit. On January 8, 1989, Wendy Moore met with informant Williams at a convenience store and provided Williams with the automobile title to Randolph's car as down payment for the hit on Tarantino. Both Wendy Moore and Randolph were charged with conspiracy to commit first degree murder.

Randolph successfully defended the Utah murder case by asserting that his wife committed suicide. While acquitted of her murder, however, Randolph pled guilty in May 1989 to witness tampering, a third-degree felony, for his attempt to have Eric Tarantino killed. He was sentenced to up to five (5) years in prison.[6] Mr. Tarantino is alive and well, and he is a potential witness in this prosecution.

DISCUSSION

NRS 48.045 provides:

> Evidence of other crimes ... 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.

Before a court will admit prior bad acts, the court must conduct a Petrocelli hearing to determine the evidence's admissibility. *See* Walker v. State, 116 Nev. 442, 997 P.2 803 (2000); McNelton v. State, 115 Nev. 396, 990 P.2d 1263 (1999). During the Petrocelli hearing the State must prove that: "(1) the incident is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is

[6] Randolph sought and obtained an order sealing and expunging the record of his case in Utah.

not substantially outweighed by the danger of unfair prejudice." Phillips v. State, 121 Nev. 591, 600-01, 119 P.3d 711, 718 (2005). "The admissibility of prior bad acts evidence under NRS 48.045 is within the discretion of the trial court and its decision will not be disturbed on appeal unless it is manifestly wrong." *Id.*

The enumerated exceptions in NRS 48.045(2) are merely illustrative, not exhaustive, of the reasons "other bad acts" may be admitted. *See* U.S. v. Cruz-Garcia, 344 F.3d 951 (C.A.9) (Nev.) (2003). Thus, neither this Court nor the State is limited by the exceptions listed in the statute as an avenue to admit other bad acts. Nevertheless, Randolph's actions in Utah are admissible based upon no less than six of the enumerated exceptions in NRS 48.045(2), namely: (1) motive; (2) intent; (3) preparation; (4) plan; (5) knowledge; and (6) identity. A comparison of the Nevada and Utah cases reveals the obvious admissibility.

1. The Prior Murder and Solicitation Cases Are Relevant to the Murder of Sharon Cause Randolph & the Probative Value of the Prior Acts is Not Substantially Outweighed by the Danger of Unfair Prejudice

Randolph's defense to the instant charges is that an intruder killed his wife and he, in turn, killed the intruder. Thus, Randolph asserts his presence and purpose at the murder scene was to protect his wife, and he had no involvement in her murder. The Utah case illustrates that Randolph's motive in this case was to eliminate his wife to collect life insurance proceeds; the Utah case proves Randolph's actual intent was to have Sharon killed; the Utah case illustrates Randolph's plan to stage a burglary so he could claim his wife was murdered which would enable Randolph to collect insurance proceeds; the Utah case establishes Randolph's knowledge that he indeed knew an "intruder" would be present in the home he shared with Sharon; the Utah case illustrates that the true identity of the person responsible for both Sharon's and Miller's death is Thomas Randolph; and the Utah case rebuts Randolph's defense to the charges in the instant case. Therefore, the State must be permitted to introduce evidence of the Utah case to expose Randolph's true motive, intent, plan, knowledge and identity as the actual perpetrator behind the events of May 08, 2008.

Becky Gault, like Sharon, died of a gunshot wound. She, like Sharon, was dead

within a few years of her marriage to Randolph. There, as here, Randolph "found" his wife dead in a home they shared. In Utah, as in Nevada, Randolph's wife was killed by a single gunshot wound to the head. In each case, Randolph had taken out multiple life insurance policies on his wife. In both cases, Randolph collected hundreds-of-thousands-of-dollars in life insurance proceeds. In that case, as in this case, Randolph solicited a friend to assist him in killing his wife. In both cases, Randolph took steps to have his accomplices killed - - in Utah, he failed; in Nevada, he succeeded.

Courts, including the Nevada Supreme Court, have long recognized the admissibility of "other bad act" evidence to illustrate a perpetrator's motive, intent, preparation, plan, knowledge and identity. More specifically, courts permit the introduction of "other bad act" evidence to prove common plan or scheme in a variety of contexts, including the collection of insurance proceeds. Thus, in U.S. v. Decicco, 370 F.3d 206, 212 (2004), an arson prosecution, the appellate court held it was permissible to admit evidence of previous fires started by Decicco to prove to prove a common scheme to defraud using arson of property. The court relied on "the degree of resemblance of the crimes" and the "object" of the crimes in concluding that the evidence was probative of a common scheme or plan. *Id.* at 212-213.

Similarly, in Tillema v. State, 112 Nev. 266, 268-269 (1996), the Nevada Supreme Court held it was proper to admit a previous vehicle burglary to show Tillema's common plan or scheme and his intention to feloniously enter vehicles on subsequent occasions. The evidence was probative of Tillema's "intent, motive, and plan," and any prejudicial effect was cured by the district court's limiting instruction. *Id.* at 268 (interpreting NRS 173.115 "common scheme or plan" language).

In Brinkley v. State, 101 Nev. 676 (1985), the trial court similarly permitted the State to introduce evidence of other bad acts for the limited purpose of, *inter alia*, showing a common scheme or plan. The evidence in question revealed that subsequent to the occurrence of the substantive crimes, appellant's co-defendant, Drummond, attempted to obtain a controlled substance by utilizing a forged prescription. *Id.* at 680. While Drummond attempted to fill the prescription, defendant Brinkley waited outside in the car.

Id. Brinkley admitted he had obtained a blank prescription form from Dr. Carlson. *Id.*

The court reasoned that evidence under the "common plan or scheme" exception must tend to prove the charged crimes by revealing that the defendant planned to commit the crimes. *Id.* at 679 *citing* Cirillo v. State, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980). The offense must tend to establish a preconceived plan which resulted in commission of the charged crime. *Id. citing* Nester v. State, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959), Wigmore on Evidence, 2d Ed. § 300. Brinkley claimed that the failure to disclose to each practitioner that he was receiving controlled substances from other practitioners was the result of innocent mistake. *Id.* at 680. The evidence of the forgery negated this claim of innocent mistake. *Id.* The forged prescription revealed that Brinkley did plan to deceive for the purpose of obtaining controlled substances. *Id.* The forged prescription also tended to prove that Brinkley and Drummond planned and schemed to obtain numerous prescriptions for controlled substances. *Id.* The evidence logically tended to show a common plan or scheme. The purpose of admitting the evidence was not merely to show a criminal disposition. *Id.* Finally, the trial court attempted to minimize any unnecessary prejudice by excluding evidence that appellants were arrested as a result of this forged prescription and that Drummond was convicted for his participation in the offense. *Id.*

Additionally, the Nevada Supreme Court has recognized the admissibility of *prior murders* to prove common scheme or plan in *murder prosecutions*. Thus, in Gallego v. State, 101 Nev 782 (1985), two young women, Stacey Redican and Karen Twiggs, disappeared from a shopping mall in Sacramento, California, on April 24, 1980. Their bodies were discovered on July 27, 1980, in shallow graves in Limerick Canyon, Nevada. *Id.* at 784. The hands of both girls were tied with an uncommon variety of rope. *Id.* at 784. An autopsy revealed that both victims suffered violent deaths caused by multiple blows to the head with a hammer or hammer-like object. *Id.* at 784.

During the course of trial, evidence was adduced concerning similar conduct by Gallego in the earlier killing of two young women kidnapped from another shopping mall in the Sacramento area. *Id.* The latter victims were killed by bullets to the head, whereas

Stacey and Karen had been bludgeoned to death by a hammer purchased by Gallego. *Id.*

At trial, the State was permitted to introduce evidence of the September 11, 1978, Sacramento homicides of Kippie Vaught and Rhonda Scheffler. *Id.* at 788-789. Purposes for which the evidence was admitted included, *inter alia*, common plan, intent, identity and motive, all exceptions to the Nevada evidence code prohibiting evidence of prior misconduct in order to show that the defendant acted in conformity therewith. *Id.* The Nevada Supreme Court held that the trial court did not err in permitting evidence of the prior killings to be introduced at trial. *Id.* Despite the dissimilarities in the manner in which the victims were killed, substantial similarities were shown to exist in plan and intent, and the probative value of the evidence outweighed prejudice to the defendant. *Id.* Finally, evidence of the Vaught and Scheffler homicides satisfied the "plain, clear and convincing" standard required for its admissibility. *Id.* at 789.

Similarly, in Thompson v. State, 102 Nev 348 (1986), a district court permitted the introduction of *two prior homicides* in California in Thompson's first degree murder trial in Reno. On April 21, 1984, appellant met Randy Waldron and Arnold Lehto, who were camping by the railroad tracks in Reno. *Id.* at 349. At that time, appellant knew that the police were looking for him regarding a double homicide in California. *Id.* Appellant claimed he was acting in self-defense when he pulled a gun and shot Waldron four times in the head. *Id.* at 350. Thompson then moved the body and covered it with a blanket. *Id.* He also took Waldron's wallet and money, silver watch and a bottle of wine. *Id.* After Waldron's body was discovered, appellant denied any knowledge of what had happened, only later to claim self-defense. *Id.*

Thompson contended that the trial court erred in admitting evidence of two collateral homicides from California. The admission of evidence of other crimes, the Court recognized, is governed by NRS 48.045(2). That statute provides for the admission of such evidence when used for certain limited purposes. *Id.* at 351. One of the listed exceptions concerns evidence tending to show that a defendant's crime was committed in furtherance of a plan. *Id.* The State offered the evidence in question to show Thompson's plan to obtain

money to allow him to flee the state because he knew that law enforcement officers were looking for him concerning another homicide. *Id.* The evidence was admitted for that purpose, and the district court did not err in allowing the admission of such evidence. *Id.* Finally, the trial court also minimized any potential prejudice to defendant by instructing the jury on the limited use of the evidence presented. *Id.* at 351. The Nevada Supreme Court reasoned that the evidence presented by the State was substantial and convincing, it was admitted for a proper purpose under Nevada's evidence code, and the Court perceived no basis for concluding that the district court was manifestly wrong. *Id.* at 352.

Here, as in the numerous cases outlined above, evidence of Randolph's prior criminal activity in Utah is extremely probative of his motive to commit the Nevada crime, as well as his intent, his preparation, his plan, his knowledge, and his identity as the real perpetrator behind the events of May 8, 2008. Randolph's ultimate plan in this case - - as in the Utah case - - was to collect insurance proceeds; indeed, that was the primary motive for Sharon's murder. Becky, like Sharon, died of a gunshot wound to the head within a few short years of her marriage to Randolph. During both marriages, Randolph took out life insurance policies on his spouses' lives and named himself as the beneficiary. There, as here, Randolph collected hundreds-of-thousands-of-dollars in life insurance proceeds on those policies following the violent deaths of his wives. In that case, as in this case, Randolph befriended someone, and then solicited that person, to assist him in killing his wife. In both cases, Randolph took steps to have his accomplices killed - - in Utah, he attempted but failed to kill Eric Tarantino; in Nevada, he succeeded in killing Michael Miller.

Further, the Utah case is extremely probative of Michael Miller's killing. Indeed, it explains the reason for Miller's murder. Randolph claims Miller was an intruder who killed Sharon. In fact, however, Miller was Randolph's accomplice. He, like Tarantino, was befriended by Randolph. Miller, like Tarantino, was solicited by Randolph to kill Randolph's wife. Tarantino turned against Randolph and testified against Randolph in his previous murder trial. Randolph learned from his previous mistake. If he left his co-conspirator alive in the instant case, as he did his accomplice in Utah, that person could

testify against him. Randolph ensured that didn't, and couldn't, happen in this case the only way he could - - by killing Michael Miller. Therefore, evidence of Randolph's efforts to kill Eric Tarantino is highly probative of Randolph's actions regarding Michael Miller in this case.

As outlined in the above-referenced cases, any prejudice to Defendant concerning "other bad act" evidence is properly cured by an instruction which informs the jury of the limited purpose regarding its admissibility. Additionally, Randolph would be permitted to inform the jury in this case that he was acquitted of Becky Gault's murder. Accordingly, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

2. The State Can Prove the Prior Acts by Clear & Convincing Evidence

A previous jury found that the prosecuting agency in Utah did not prove Randolph's guilt of Becky Gault's murder "beyond a reasonable doubt" and acquitted Randolph. The United States Supreme Court, however, has held that acquittals may be admissible as prior bad acts because "[acquittals] do not prove that the defendant is innocent, it merely proves the existence of a reasonable doubt as to his guilt." Dowling v. U.S., 493 U.S. 342, 349, 110 S. Ct. 668, 672 (1990).

In Dowling, the defendant robbed a bank and two weeks later robbed a lady's home. *Id.* at 344, at 670. Defendant was acquitted on the home-invasion robbery. *Id.* at 345, at 670. The jury was hung as to the bank robbery charges. *Id.* at 344, at 670. At the second bank robbery trial, the defendant was convicted but the conviction was reversed on appeal. *Id.* During his third bank robbery trial, the State introduced as evidence the testimony of the lady whose home was robbed two weeks after the bank heist. *Id.* The government alleged that the identification of the robber in both incidents was sufficiently close to strengthen its case as to the robber's identity. *Id.* at 345, at 670.

The United States Supreme Court held that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard." *Id.* at 349, at 672; *See also* Charles v. Hickman, 228

F.3d 981, 986 (9th Cir. 2000). The Ninth Circuit Court of Appeals, interpreting the Dowling case, stated that prior bad acts are admissible "[b]ecause the jury could reasonably conclude that Dowling committed the burglary yet not believe it beyond a reasonable doubt." U.S. v. Seley, 957 F.2d 717, 723 (9th Cir. 1992). "If an act that could have been proved to a lesser degree than that required for conviction is for some reason probative in a subsequent trial, it need not be excluded because of the prior acquittal." *Id.*

The standard of proof in Nevada to admit prior bad act evidence is "clear and convincing," which is, of course, a lower standard than the "beyond a reasonable doubt standard" necessary to prove guilt. Petrocelli, 101 Nev. 46, 52, 692 P.2d 503, 503 (1985); Phillips 121 Nev. at 600-01, 119 P.3d at 718. Thus, acquittals may be introduced as prior bad acts. After conducting a *Petrocelli* hearing, if the court determines that the prior bad acts, for which the defendant was acquitted, are admissible, the district court must permit the defendant to inform the jury that he was acquitted of those acts. Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 927 (1996).

Finally, the "clear and convincing" threshold regarding Randolph's prior crime involving solicitation to kill Eric Tarantino is easily satisfied; Randolph pled guilty to the felony offense of witness tampering.

CONCLUSION

Based on the foregoing, the State of Nevada respectfully requests that this Court permit the introduction of the killing of Becky Gault Randolph and the solicitation to kill Eric Tarantino in Randolph's upcoming murder trial. Randolph's ultimate goal in both cases was to collect insurance proceeds and eliminate witnesses. During both marriages, Randolph took out life insurance policies on his spouses' lives and named himself as the beneficiary. In both cases, Randolph's wives died of gunshot wounds to the head within a few short years of their marriages to Randolph. In both cases, the victims were killed in a home they shared with Randolph. In both cases, Randolph collected hundreds-of-thousands-of-dollars in life insurance proceeds. In both cases, Randolph befriended someone, and then

solicited that person, to assist Randolph in killing his wife. In both cases, Randolph took steps to have his accomplices killed. Clearly, the prior crimes are extremely probative of Randolph's motive, intent, preparation, plan, knowledge, and identity as the real perpetrator behind the events of May 8, 2008.

DATED this 23rd day of September, 2009.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Robert J. Daskas
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 23rd day of September, 2009, by facsimile transmission to:

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BY: /s/ Jennifer Georges
Secretary for the District Attorney's Office

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EXHIBIT "D"

11-4

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

THOMAS RANDOLPH,

Defendant.

Case No. C250966
Dept. No. 23

OPPOSITION TO MOTION TO ADMIT EVIDENCE OF PRIOR BAD ACTS

COMES NOW Defendant, Thomas Randolph, by and through his counsel Yale E. Galanter, Esq. and E. Brent Bryson, Esq. and files his Opposition to Motion to Admit Evidence of Prior Bad Acts. This Opposition is made and based upon the following Points and Authorities, the papers and pleadings on file herein, together with oral argument at the time of hearing.

INTRODUCTION

In its Motion to Admit Evidence of Prior Bad Acts, the State is attempting to introduce "evidence" that Randolph had been previously acquitted of murdering his ex-wife Becky in Utah,

in a similar manner to the way Sharon Randolph was killed in the instance case. In addition, the State has requested to introduce evidence of Randolph's guilty plea to witness tampering in the Utah case. However, the State fails to support its alleged facts with any admittable evidence. Instead, the State spins a tall tale ostensibly pieced together from hearsay and media accounts of the Utah case, in addition to the uncredible and self-serving statements of Eric Tarrantino.

The State spins its "story" with inflammatory statements and innuendo. The State begins their "tale" by stating that Thomas Randolph has been married six times, and that four of those wives are dead. While this is true, the manner in which the State asserts this statement suggests that Randolph is in the habit of killing wives. In actuality, Thomas Randolph has two living ex-wives, one ex-wife who died of cancer (after they were divorced), and one wife who died as a result of medical malpractice from a botched surgery (which resulted in a civil suit that was resolved in Randolph's favor).

The State also erroneously asserts that Randolph took out life insurance policies on both Becky Randolph and Sharon Randolph before they died. However, the State makes no mention of the fact that Randolph was the beneficiary of all of his wives' insurance policies **and that they were the beneficiaries of his life insurance policies as well.** The State also makes note of the fact that both Becky and Sharon were killed by gun shot wounds to the head. However, the paramount issue in the Utah murder case was whether Randolph had shot his wife Becky, while it is uncontroverted that Sharon was shot in Las Vegas by Michael Miller.

The State additionally asserts the fact that Randolph went to his father's house in Utah to call 911 after discovering Becky's body, suggesting that such action was improper. However, the State fails to mention that the Randolphs' phone service had been disconnected in the home where Becky was found, and this case predated the widespread use of the cell phone.

In another inflammatory allegation, the State claims that Randolph asked Tarrantino to kill Becky in 1982 and then tried to convince Tarrantino to kill Becky in February of 1983, after Tarrantino had left his job working with Randolph and began working elsewhere. However, Randolph married Becky in April of 1983. If it is the State's contention that Randolph marries women and kills them for life insurance benefits, it would be rather absurd to accept that

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Randolph tried to hire Tarrantino to kill Becky before he became the named beneficiary of her life insurance policy.

The State also preposterously asserts that Tarrantino witnessed Randolph's attempt to kill Becky in a mobile home fire based on Tarrantino's statement that he had a "feeling" that a fire was started after he admittedly consumed four to five beers and stated that he, Tarrantino, was the one that actually arranged the clothes to catch fire on candles inside the mobile home. In addition, the fire was ruled accidental at the time. Furthermore, the State attempts to persuade this court that Tarrantino told Becky that the fire was set on purpose to kill her, but that Becky remained married to Randolph for almost two more years prior to her death.

Last, the State erroneous asserts that Randolph pled guilty to witness tampering for his "attempt to have Tarrantino killed." Ignoring the absurdity that the State of Utah and the Utah Court would allow a plea to witness tampering in lieu of a conviction for solicitation to kill, there is no evidence or record that the guilty plea to witness tampering was an admission that Randolph tried to have Tarrantino killed. Randolph pled guilty to tampering with a witness, not trying to kill one. Indeed, as set forth later in this opposition, there were multiple issues surrounding Randolph's plea.

In essence, the "facts" provided by the State to support the admission of evidence of the Utah case are inflammatory and speculative and thus not admissible to prove any alleged prior bad acts.

POINTS AND AUTHORITIES

The parties do not dispute the applicable law dealing with the admissibility of alleged bad acts. The pertinent issue in this case is whether the State can meet the high standard established by the legislature and the Nevada Supreme Court concerning this type of evidence.

NRS 48.045 prohibits the admission of evidence of other crimes, wrongs or acts as proof of a person's character. While *NRS 48.045* does permit admission of prior bad acts to prove intent, identity, or absence of mistake or accident, the Nevada Supreme Court regards the admission of prior bad acts with disfavor, finding their presentation to the jury as often "irrelevant and prejudicial." *Rhymes v. State*, 107 P.3d 1278, 1281-82 (2005). To overcome

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the presumption of inadmissibility, the State must provide clear and convincing evidence that the act or acts occurred. Additionally the State must prove that the probative value of the proffered evidence **substantially outweighs** the danger of unfair prejudice. (Emphasis added.) *Petrocelli v. State*, 110 Nev. 46 (1985); *Tinch v. State*, 113 Nev. 1170, 1176 (1997).

The Nevada Supreme Court has also noted that, prior "bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." *Walker v. State*, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000). The principal concern this Court should have with admitting such claimed acts is that the jury will be unduly influenced by the evidence, and may convict Randolph because it believes Randolph is a bad person. *Id.*

The Nevada Supreme Court has emphasized that *NRS 48.045(2)* is merely an exception to the general presumption that prior bad acts are inadmissible. See *Petrocelli*, 101 Nev. 51-52; *Armstrong v. State*, 110 Nev. 1322, 1323, 885 P.2d 600, 601 (1994) (requiring that the trial court findings be made on the record so as to facilitate appellate review of the trial court's decision); *Tinch*, 113 Nev. 176 (outlining the substantive criteria for admitting prior bad act evidence). Prosecutors seeking admission of this volatile evidence must do so in the pursuit of justice as a servant of the law, "the two-fold aim of which is that the guilty shall not escape nor innocent suffer." Thus, "it is as much [a prosecutors] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." *Berger v. State*, 295 U.S. 78, 88 (1935). While evidence of prior bad acts can be admitted for a limited purpose, certain procedural requirements and certain substantive criteria must first be met.

In Nevada, "for evidence of prior bad acts to be admissible, the district court must hold a hearing outside the presence of the jury and determine 'that: (1) the incident is relevant to the crime charged; (2) *the act is proven by clear and convincing evidence*; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.'" *Chavez v. State*, 213 P.3d 476, 488 (Nev. 2009); quoting *Diomampo v. State*, 185 P.3d 1031, 1041 (2008).

. . .

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In the instant case, the State alleges that evidence of Randolph's Utah murder trial, of which he was acquitted, and subsequent tampering with a witness case are admissible under *NRS* 48.045(2) because it is relevant to 1) motive, 2) intent, 3) preparation, 4) plan, 5) knowledge, and 6) identity. However, the State's reasoning in applying these exceptions is flawed, based on suspect information, and irrelevant to prove any of the elements of his current charges.

A. THE PROSECUTION CANNOT ADMIT EVIDENCE OF THE BECKY RANDOLPH CASE BECAUSE RANDOLPH WAS ACQUITTED.

Thomas Randolph was found **not guilty** of murder charges stemming from the death of his ex-wife Becky by a jury of his peers. However, the State is now attempting to resurrect this case, which is over twenty years old, knowing full well it cannot meet the high standard of review under our evidence code. Under the law of Utah, and the United States, a jury found that reasonable doubt existed as to whether Thomas Randolph had committed murder. While the State argues that this evidence may be admitted in the current proceeding under the standard of clear and convincing evidence, it is a fine line between clear and convincing evidence and proof beyond a reasonable doubt. Randolph submits that this Court should not substitute its judgment for the judgment of the Utah jury. Thus, this Honorable Court should exclude the State from introducing the evidence concerning the Becky Randolph case.

The State relies on the United States Supreme Court's finding that in limited circumstances evidence of a prior bad act may be admitted, even if the defendant had been previously acquitted of the charges constituting that act. *Dowling v. United States*, 493 U.S. 342, 349 (1990). In *Dowling*, the court was relying on Federal Rule of Evidence 404, which allows the admission of relevant bad acts so long as they can be proven by a preponderance of the evidence, which is a much lower standard than Nevada's requirement that prior bad acts be proven by clear and convincing evidence.

Furthermore, the circumstances in the *Dowling* case are readily distinguishable from the circumstances in the instant case. In *Dowling*, the prosecution brought in testimonial evidence of a woman who claimed that the defendant had robbed her in her home in a similar manner as the

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defendant was accused of robbing a bank only two weeks later. The Defendant in *Dowling* was acquitted of the home invasion robbery, but the prosecution believed that this evidence would be probative in identifying the Defendant as the man who robbed the bank.

In this case, the identities of the parties involved is uncontroverted. Michael Miller shot and killed Sharon Randolph, and in turn Thomas Randolph shot Michael Miller. To date, the prosecution has provided no evidence to support a nexus between the Utah cases and the Las Vegas case, beside mere speculation and conjecture. In the *Dowling* case, the prosecution was aware of how the crime had occurred, but simply needed to identify the parties involved. In this case, the prosecution is trying to prove a sequence of events occurred, of which there is no additional proof, by dredging up accusations that are nearly two decades old and were found to be without sufficient proof to sustain a conviction.

It is clear from the dearth of evidence in the present case, that the State would have no reason to even suspect that Randolph hired Miller to kill Sharon Randolph, had Randolph not been tried in Utah for the murder of Becky and the witness tampering case. Simply put, all evidence in this case points to a self-defense shooting in a home invasion and the State is trying to use a past acquittal to introduce highly prejudicial evidence that has no probative value in proving the events in this case.

The State also relies on the case of *Charles v. Hickman*, 228 F.3d 981, 986 (9th Cir. 2000), for the same legal principal as was set forth in the *Dowling* case. However, the Court's reasoning is important. In that case the State presented evidence at Charles' trial for the murder of Mitchell, that Charles stabbed an individual by the name of Bonton in retaliation for Bonton's having snitched on him regarding an earlier robbery. The Court held that the evidence was relevant to show that Charles shot the victim, not in self-defense, but rather in retaliation for Mitchell also having snitched on him regarding the robbery. The prosecution presented the evidence in Bonton pursuant to *California Evidence Code* §1101, which, like *Federal Rule of Evidence* 404(b), permits the introduction of prior bad acts. "Evidence of the Bonton stabbing admitted under §1101 did not need to be proved beyond a reasonable doubt **but rather** by a

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preponderance of the evidence." (Emphasis added.) *Charles*, 228 F.3d 986. Because the introduction of the Bonton stabbing in the murder trial was governed by a preponderance of the evidence standard of proof (instead of the beyond a reasonable doubt standard in the original stabbing trial), the government was not precluded from re-litigating the issue. A jury could have believed that Charles more likely than not stabbed Bonton in retaliation for snitching, but did not believe it beyond a reasonable doubt. Accordingly, the evidence was not barred by the collateral estoppel rule. *Id.* Again, it is clear from Ninth Circuit law that the pivotal decision was made based on a much lower evidence standard than here in Nevada.

Furthermore, Nevada law recognizes that clear and convincing evidence is a higher legal standard than that of preponderance of the evidence. See *Means v. State*, 120 Nev. 1001, 1014 (2004). While clear and convincing evidence is a lower standard than reasonable doubt, it is a level of evidence far above that which was interpreted by the United States Supreme Court in the *Dowling* case or by the Ninth Circuit in the *Charles* case. In addition, other jurisdictions have found that a prior acquittal is not admissible bad act evidence. See *State v. Bell*, 594 S.E.2d 824, 826-27 (2004); *State v. Kilgore*, 53 P.3d 974 (2002); *State v. Cuen*, 736 P.2d 1194 (1987). As such, the State has failed to show that evidence of an alleged bad act, of which the defendant was acquitted, is admissible under *NRS* 48.045.

B. <u>THE UTAH CASE EVIDENCE IS SUSPECT.</u>

The State proposes in its Motion to Admit Evidence of Prior Bad Acts to introduce "evidence" that Randolph pled guilty to witness tampering in the Utah case. Though it is true that Randolph did plead guilty to the charges, The Second Judicial District Court of Utah explicitly found the following:

> The information tends to show that the investigating officer was dishonest in his investigation, that witnesses Williams and Tarrantino are self-serving, conniving and dishonest, and that the defendant was a victim of the system and forced into tampering with a witness in order to protect himself.

(See Exhibit "A" attached hereto and incorporated herein by reference.)

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Despite the courts findings, it chose to uphold Randolph's sentence. However, the Deputy Attorney General assigned to represent the State of Utah on Randolph's Habeas Corpus petition found the sentence to be unfair, stating:

> I represent the State of Utah in my capacity as an Assistant Attorney General for the State of Utah. I became involved in representing the State on a writ of habeas corpus that Tom Randolph filed. In my review of his case it became evident that he had been illegally sentenced based upon factual allegations that were untrue but adopted by the judge. I reviewed the case with Carvel Harward, the Davis County Attorney that prosecuted the case. We jointly decided that Mr. Randolph had been illegally sentenced and we stipulated to a new sentencing.

(See Exhibit "B" attached hereto and incorporated herein by reference.)

In the Assistant Attorney General's view of the case, it became evident that the sentence was illegal based on the factual allegations that were untrue but adopted by the judge. Based on that, the parties stipulated to a new sentencing. The result had such an impact on the judge that the re-sentencing resulted in Randolph receiving probation.

In order to better clarify the preclusive effect of Randolph's acquittal on the admissibility of Tarrantino's testimony, the Defendant offers the Sixth Circuit's persuasive statement that,

> . . . collateral estoppel only prohibits the government from relitigating *issues* which had previously been decided in the defendant's favor. This Court stated that in making a collateral estoppel ruling the court must first determine what the government is attempting to prove through reintroduction of the prior conduct evidence. The court must next determine whether that same issue had been decided by an earlier jury in the defendant's favor. If the court finds that the issue has been so decided in the defendant's favor, collateral estoppel prohibits the admission of the prior conduct evidence. If, however, after examining the record of the first trial that jury rationally have acquitted the defendant and *not* decided the issue in his favor, collateral estoppel does not bar admission of the prior conduct evidence. *United States v. Johnson*, 697 F.2d 735, 740 (6th Cir. 1983).

In this case, it is impossible to determine whether a jury could have acquitted Randolph without Tarrantino's testimony because the trial transcript no longer exists. Furthermore, it is clear that the State is attempting to bring in the testimony of Tarrantino in order to show that Randolph had attempted to kill Becky Randolph. However, with no record to review it is impossible to determine whether the jury could have "rationally acquitted the defendant" and yet still believe Tarrantino's testimony.

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Furthermore, the State claims in its present motion that the "facts" of the Utah case were primarily gleaned from "trial transcripts, officer's reports, and witness statements." However, in this case Randolph successfully petitioned the court to seal the records of this case and the State has failed to produce any certified trial transcripts in the requested discovery. Additionally, as the court well knows, any trial transcript would need to be authenticated, and the court reporter of the Utah trial is unfortunately deceased. In addition, the lead defense attorney on the case is deceased and the file has been destroyed (a fact confirmed by E. Brent Bryson's face to face conversation with Bernard Allen, Esq., the second chair on the Utah murder trial, in Ogden, Utah).

The State is attempting to retry a case, based on information and "evidence" that is incomplete and decades old. However, even when the case was fresh in the minds of witnesses, and the forensic evidence was available, a jury still found Randolph innocent of murder. The State's attempted resurrection of the Utah case with spotty evidence is clearly inadmissible. Nothing provided by the State in the discovery phase of this case rises to the level of clear and convincing evidence. In fact, much of it appears to be based on hearsay from the media and the speculation of witnesses who were either adjudicated as uncredible or are no longer available to be cross-examined. As such, it is clear that the State does not possess the requisite evidence to meet the "clear and convincing" standard to admit evidence of alleged prior bad acts.

C. **THE ADMISSION OF EVIDENCE CONCERNING RANDOLPH'S PREVIOUS ACQUITTAL FOR MURDER IN A SUBSEQUENT CAPITAL MURDER PROCEEDING VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS' PROHIBITIONS AGAINST DOUBLE JEOPARDY.**

As discussed earlier, the State presented several cases that allegedly support its position that an acquittal in an earlier trial may be introduced as prior bad act evidence in a subsequent criminal trial. Aside from the contention that this argument is fundamentally flawed and inconsistent with Nevada law, and the United States Constitution, none of the cases cited by the State involved a capital murder charge.

Under *NRS* 200.033(2)(a), an aggravating circumstance for the imposition of the death penalty is whether the defendant has previously been convicted of murder. Though Randolph

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was not convicted of Becky Randolph's murder, and was in fact acquitted, the State is essentially asking to introduce "proof" that Randolph committed the Utah murder in a capital murder trial here in Las Vegas, thus triggering an aggravating factor for the imposition of the death penalty. Since this de facto conviction could result in the imposition of a greater sentence, death, the admission of this evidence would result in a grievous violation of the Fifth and Fourteenth Amendments' rights against double jeopardy. Should Randolph be found guilty of murder, and the trial enters the death penalty phase, he would be subjected to a harsher sentence predicated on evidence of a crime of which he was already acquitted by a **jury of his peers**.

The State will likely argue that a limiting instruction on the evidence would cure the situation should a conviction be obtained. However, not only does the introduction of such evidence "ring" the quintessential bell that may not be unrung, Nevada law recognizes that the jury may consider factors outside the categories listed in *NRS* 200.033(2)(a). See *Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996).

Furthermore, *NRS* 200.035(1) permits the jury to consider the defendant's lack of significant criminal history as a mitigating factor for the imposition of the death penalty. Should the State be allowed to admit the highly prejudicial and non-probative evidence of the Utah murder trial and the witness tampering plea, the jury would be improperly prejudiced against the defendant and possibly utilize this salacious and unfounded "evidence" provided by the State to conclude that Randolph is a serial murderer and sentence him to death. Accordingly, the admission of evidence from the Utah case as evidence of prior bad acts at this trial would be highly prejudicial and should be excluded.

CONCLUSION

There is not an appreciable difference between the reasonable doubt standard and the clear and convincing standard warranting this Court to substitute its judgment over the judgment of a jury of Randolph's peers in the Utah murder case. Likewise, there is sufficient doubt as to the facts and circumstances surrounding Randolph's plea to witness tampering. The aforementioned is the type of highly prejudicial testimony that the Supreme Court deems suspect.

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This alleged prior bad act evidence should also be excluded from trial.

Based upon the foregoing, it is respectfully submitted that this Court deny the State's Motion to Admit Prior Bad Acts in its entirety.

DATED this 4 day of November, 2009.

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By _____

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EXHIBIT "A"

In the Second Judicial District Court
in and for the
County of Davis, State of Utah

STATE OF UTAH, Plaintiff, vs. THOMAS WILLIAM RANDOLPH, Defendant.	)	RULING ON REQUEST TO REVIEW EVIDENCE Criminal No. 6277

At the time of sentencing the court agreed to review information pertaining to the seriousness of the offense if it was supplied to the court. The court received such information on September 18, 1989, and has reviewed it.

The information tends to show that the investigating officer was dishonest in his investigation, that witnesses Williams and Tarrintino are self-serving, conniving and dishonest, and that the defendant was a victim of the system and forced into tampering with a witness in order to protect himself.

Nothing that I have read has changed my mind about the sentence in this case. I think prison was the appropriate remedy.

The motion to review the sentence and place you on probation is denied.

Dated October 6, 1989.

BY THE COURT:

JUDGE

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE

COUNTY OF DAVIS, STATE OF UTAH

1-801-451-4405

STATE OF UTAH,	:	
Plaintiff,	:	MINUTE ENTRY
vs.	:	July 14, 1992
RHOMAS WILIAM RANDOLPH,	:	69170 6277
Defendant.	:	

RODNEY S. PAGE, Judge
Michelle Harrison, Reporter
Leslie L. Snow, Clerk

This is the time set for Request on 402 motion. The defendant is present. Carvel Harward is present on behalf of the State of Utah.

Rich Webber is present on behalf of AP&P. He indicates that defendant has met all conditions and requests that probation be terminated.

Court will terminate probation and grant the 402 motion reducing the matter to a Class A.

EXHIBIT "B"

OFFICE OF THE ATTORNEY GENERAL

STATE OF UTAH

JAN GRAHAM
Attorney General

January 20, 1994

TO WHOM IT MAY CONCERN:

I was asked to write a letter concerning Tom Randolph, specifically describing why his criminal sentence was overturned by the Second District Court for the State of Utah.

I represent the State of Utah in my capacity as an Assistant Attorney General for the State of Utah. I became involved in representing the State on a writ of habeas corpus that Tom Randolph filed. In my review of his case it became evident that he had been illegally sentenced based upon factual allegations that were untrue but adopted by the judge.

I reviewed the case with Carvel Harward, the Davis County Attorney that prosecuted the case. We jointly decided that Mr. Randolph had been illegally sentenced and we stipulated to a new sentencing. Part of this procedure was to clear up alleged facts that were not correct.

When Judge Rodney Page resentenced Mr. Randolph based upon the corrected record, he decided to put Mr. Randolph on probation. He was on intensive supervised parole for a period of time and ultimately successfully completed his parole.

It is my understanding that Judge Page also granted a motion to reduce Mr. Randolph's conviction from a third degree felony to a Class A misdemeanor.

If you need any additional information please feel free to contact me directly at 575-1600.

Sincerely,

Kirk M. Torgensen

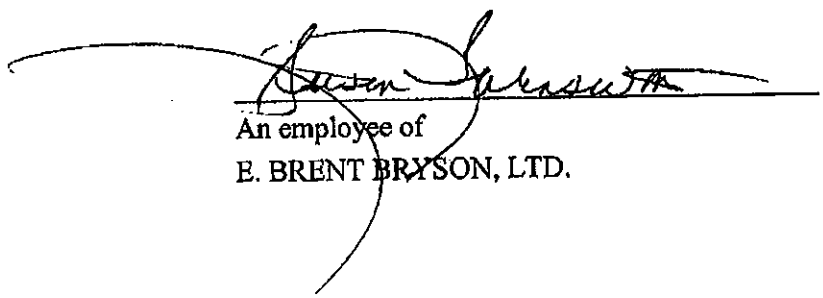
KIRK M. TORGENSEN
Assistant Attorney General

KMT:jr

CERTIFICATE OF MAILING

I hereby certify that on the 4 day of November, 2009, I served a copy of the foregoing Opposition to Motion to Admit Evidence of Prior Bad Acts upon the appropriate party hereto by depositing a true copy thereof in the United States Mail, postage prepaid thereon, addressed to:

Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Attorneys for State of Nevada



An employee of
E. BRENT BRYSON, LTD.

E. BRENT BRYSON, LTD
3202 W. Charleston Blvd.
Las Vegas, Nevada 89102
(702) 364-1234

EXHIBIT "E"

RPLY

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- THOMAS WILLIAM RANDOLPH, #273406 Defendant.	CASE NO: C250966 DEPT NO: XXIII

REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO ADMIT EVIDENCE OF PRIOR BAD ACTS

DATE OF HEARING: 12-04-09
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through ROBERT J. DASKAS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Opposition to Motion to Admit Evidence of Prior Bad Acts.

This reply is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

INTRODUCTION

On September 23, 2009, the State filed its Motion to Admit Other Bad Acts which outlined the reasons Defendant Randolph's prior murder and solicitation-to-commit-murder cases should be admitted in his upcoming murder trial, despite the fact that Randolph's prior cases were sealed and expunged.

On September 24, 2009 - - just one day after the State filed its Motion to Admit Other Bad Acts - - a seminal opinion was issued by the Nevada Supreme Court which solidifies the State's position regarding the admissibility of Randolph's previously sealed and expunged cases, and provides the State and this Honorable Court with guidance regarding the procedure to be utilized in introducing those prior cases.

DISCUSSION

In Zana v. State[1], - - Nev. - - , 216 P.3d 244 (2009), the Nevada Supreme Court addressed the admissibility of testimony regarding prior bad acts where the records of the criminal proceedings resulting from those acts have been sealed or expunged. The Zana case arose out of multiple allegations by several female students that Zana, a fifth-grade teacher, had touched them inappropriately while they were under his supervision. *Id.* at 246. In total, six girls came forward alleging Zana would touch their breasts and/or invite them to place their hands in his pocket to get candy. *Id.* During the investigation of those allegations, two previous allegations against Zana came to light.

In 1992, while Zana was living in Pennsylvania, he was accused of pinning a 13-year-old girl against his bed and fondling her breast. The 1992 case against Zana was concluded when he agreed to a plea bargain that prohibited him from teaching minors. The records of the case were subsequently expunged pursuant to the plea agreement and in accordance with Pennsylvania law. *Id.* at 246.

[1] A copy of the Zana opinion is attached as Exhibit 1.

In 1998, while working as a teacher in Henderson, Nevada, Zana was accused of enticing a second-grader to touch his penis by telling her she could retrieve candy from his pocket. Criminal proceedings were also initiated as a result of the allegation in Henderson, but that case was dismissed because the victim's parents did not want her to have to testify. The records of the dismissed Henderson case were sealed. *Id.* at 246.

At trial, the State introduced the prior allegations against Zana through the testimony of his previous victims pursuant to NRS 48.045. *Id.* at 246. Through this testimony, the State sought to prove Zana's motive in touching his female students and to rebut Zana's claims that the touching was accidental, misinterpreted, or an isolated mistake. *Id.* Because records of the previous incidents were sealed or expunged, the district court limited the victims' testimony to Zana's actual conduct and the witnesses' experiences, and excluded testimony regarding subsequent charges and judicial proceedings. *Id.* at 246-247.

On appeal, Zana contended that the testimony about the allegations in Pennsylvania and Henderson were improperly admitted because these cases had previously been sealed or expunged. The Nevada Supreme Court disagreed. It reasoned as follows:

> "When a court orders a record sealed, "[a]ll proceedings recounted in the record are deemed never to have occurred." NRS 179.285. This fiction permits the subject of the sealed proceedings to properly deny his or her arrest, conviction, dismissal, or acquittal in connection with the proceedings. *See* Yllas v. State, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996). In this way, sealing orders are intended to permit individuals previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions. *See* Baliotis v. Clark County, 102 Nev. 568, 570-71, 729 P.2d 1338, 1340 (1986). "It is clear, however, that **such authorized disavowals cannot erase history. Nor can they force persons who are aware of an individual's criminal record to disregard independent facts known to them.**" *Id.* at 571, 729 P.2d at 1340."
>
> "Thus, as we have previously observed, while a sealing order erases many of the consequences that potentially flow from past criminal transgressions, **it is beyond the power of any court to unring a bell.** *See id.* For example, in Baliotis, the Las Vegas Metropolitan Police Department recommended denial of a convicted felon's application for a private detective's license based on his prior felonies even though records of the applicant's felony convictions were sealed. *Id.* at 569, 729 P.2d at 1339. This court upheld the recommendation because the officers investigating the applicant's character had personal knowledge of the applicant's criminal history. *Id.* at 570-71, 729 P.2d at 1339-40. In so doing, we respected the sealing statute's limited effect: **it erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others.** *See id.* at 571, 729 P.2d at 1340."

- - Nev. - - , *Id.* at 247 (emphasis added).

Thus, the Nevada Supreme Court held that the district court properly excluded testimony regarding *the court proceedings* that were subject to the sealing orders in order to preserve the effect of the orders, while it *correctly admitted testimony* to which the sealing orders did not apply.

> **"Neither the Pennsylvania order nor the Henderson order erased the witnesses' memories of Zana's inappropriate conduct.** Just as the sealing statute did not require the licensing commission in Baliotis to disregard the investigating officers' independent knowledge, it does not require the district court to ignore the recollections of Zana's accusers. Although statutes empower courts to seal a proceeding's records, **individual memories of events outside the courtroom are beyond such judicial control.**"

- - Nev. - -, *Id.* at 247 (emphasis added).

Finally, the district court's exclusion of testimony regarding *the proceedings* that were subject to the sealing orders secured the integrity of the sealing orders. The State did not use records of prior proceedings against Zana; instead, the State *admitted testimony* of the prior events against Zana and illuminated Zana's pattern of behavior without implicating the sealed records. *Id.* at 247-248.

Therefore, the Court concluded that the district court did not err in admitting the testimony. Instead, it properly restricted the scope of the testimony to preserve the statutory effect of the previous cases' sealing or expungement orders while allowing relevant testimony. *Id.* at 248.

By virtue of the Zana opinion, the State and this Court now have the benefit of knowing how the Nevada Supreme Court views the admissibility of prior cases which were sealed and expunged. The prior cases are admissible through the testimony of witnesses but not the use of records of the prior proceedings. The Zana case is also significant for several other reasons. For example, the case makes clear that prior acts nearly 20 years old are not too remote in time. In Zana, the prior cases occurred approximately 10 years and 17 years before the case for which he was being tried. The Court found they were nevertheless admissible. Thus, Defendant Randolph's argument that his Utah murder is inadmissible because it is too remote in time must fail. Further, Zana illustrates the point that the State

made in its original Motion to Admit Other Bad Acts; namely, Randolph's prior cases may be admitted to illuminate a pattern of behavior. This was the precise point recognized by the Supreme Court in Zana when it reasoned that the State "properly admitted testimony of the prior events against Zana and illuminated Zana's pattern of behavior without implicating the sealed records." Zana, 216 P.3d at 247-248. Further, Zana illustrates the point that the outcome of the prior case is of no significance in determining its admissibility. In Zana, one of the previous cases resulted in a dismissal. Nevertheless, the case was properly admitted as a prior bad act. Thus, Randolph's suggestion that his Utah murder case is inadmissible because it resulted in an acquittal is wrong. Finally, Zana illustrates the reasons prior cases are admissible. In Zana, the State sought to prove Zana's motive in touching his female students and to rebut Zana's claims that the touching was accidental, misinterpreted, or an isolated mistake. Similarly, in this case, the State seeks to introduce Randolph's prior cases to illustrate, *inter alia*, Randolph's motive for wanting his wife killed and to rebut Randolph's claims that his wife was killed by a home intruder acting alone. Accordingly, this Court need look no further than the Zana case to forecast how the Nevada Supreme Court would view the admissibility of Randolph's prior cases.

DEFENDANT ERRONEOUSLY ASSERTS THAT THE PROSECUTION CANNOT ADMIT EVIDENCE OF THE BECKY RANDOLPH CASE BECAUSE RANDOLPH WAS ACQUITTED

Defendant Randolph makes the blanket assertion that the prosecution cannot admit evidence of his prior Utah murder case because he was acquitted. Opposition at 5. Defendant is wrong.

The State provided this Court with authority in its original Motion that an acquittal does not preclude the prosecution from introducing evidence in a subsequent proceeding governed by a lower standard of proof. *See, e.g.*, Dowling v. U.S., 493 U.S. 342, 110 S.Ct. 668 (1990). NRS 48.045 permits the introduction of "other bad act" evidence so long as the prosecution can prove the act by "clear and convincing" evidence. The defense must

concede, as it does, this is a lower standard than "beyond a reasonable doubt." Therefore, the prior act may be admitted.

The holding in Dowling has been embraced by the Ninth Circuit Court of Appeals. Thus, in U.S. v. Seeley, 957 F.2d 717 (9th Cir. 1992), the appellate court recognized that "acquittal" simply means that certain facts were not proved beyond a reasonable doubt, rather than that the facts did not happen. Therefore, if an act that could have been proved to a lesser degree than that required for conviction is for some reason probative in a subsequent trial, it need not be excluded because of prior acquittal. The Ninth Circuit analyzed Dowling in the following manner:

> "[Dowling] was tried **and acquitted** of a burglary during which he allegedly wore a white ski mask and carried a small pistol. At a later trial for bank robbery where Dowling was again accused of wearing a white ski mask and carrying a small pistol, the government introduced evidence of the burglary **to show a pattern**."
>
> "The [United States Supreme Court] interpreted the acquittal at the burglary trial to mean that the jury was not convinced beyond a reasonable doubt that Dowling was guilty. However, at the bank robbery trial, the evidence of the burglary was introduced under Federal Rule of Evidence 404(b), which allows evidence of prior similar bad acts to show a pattern from which the jury can reasonably conclude that the act occurred and the defendant was the actor. [citation omitted.] Because the jury could reasonably conclude that Dowling committed the burglary yet not believe it beyond a reasonable doubt, the [United States Supreme Court] held that the evidence of the burglary – of which Dowling was acquitted – **was admissible at the bank robbery trial**.

957 F.2d at 723 (emphasis added).

Here, as in Dowling, the prior cases demonstrate, *inter alia*, a pattern by Randolph of soliciting others to have his wives killed to collect insurance proceeds. Defendant Randolph attempts to distinguish Dowling by suggesting the Federal Rules of Evidence are more lax than the Nevada Revised Statutes (and case law) regarding the introduction of prior bad acts. He asserts that in Dowling, the Court was relying on Federal Rule of Evidence 404(b) which allows the admission of relevant bad acts so long as they can be proven **by a preponderance of the evidence** which is, according to Randolph, a much lower standard than Nevada's requirement that prior bad acts be proven by clear and convincing evidence. Opposition at 5.

///

Defendant is, at best, mistaken. The *Dowling* opinion did not address the standard of proof that must be met before a prior bad act may be introduced in a subsequent criminal trial. Other cases, however, make it clear that the Ninth Circuit, like the State of Nevada, require a clear and convincing standard. *See, e.g.,* United States v. Lopez-Martinez, 725 F.2d 471, 477 (9th Cir.) *cert. denied* 469 U.S. 837, 105 S.Ct. 134, 83 L.Ed.2d 74 (1984); U.S. v. Simtob, 901 F.2d 799 (9th Cir. 1990); United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976); U.S. v. Feinberg, 535 F.2d 1004 (9th Cir. 1976). Indeed, the highest court of this Nation has recognized that the Seventh, Eighth, Ninth, and District of Columbia Circuits require the Federal Government to prove to the court by clear and convincing evidence pursuant to Federal Rule of Evidence 404(b) that the defendant committed the similar act. Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). This is the same threshold required by the State of Nevada regarding the admissibility of other bad acts pursuant to NRS 48.045.

DEFENDANT'S PRIOR MURDER-FOR-HIRE CASE IS NOT 'SUSPECT'

Defendant asserts that his prior murder-for-hire case (which resulted in a guilty plea to witness tampering) is inadmissible because it is suspect. Opposition at 7. To support his argument, Defendant attached court minutes to his Opposition which purportedly comment on the investigation and witnesses.

In fact, however, the Judge reviewing the information concluded, "Nothing that I have read has changed my mind about the sentence in this case. I think prison was the appropriate remedy. The motion to review the sentence and place you on probation is denied." Exhibit A to Defendant's Opposition.

Most importantly, Defendant Randolph entered a guilty plea to the charge. In other words, Randolph's guilt was established beyond a reasonable doubt. This clearly exceeds the "clear and convincing" threshold which must be met before a prior bad act is admissible. Even assuming, *arguendo*, that Randolph was *re-sentenced* for his crime, his conviction was neither vacated nor set aside. Thus, he stands convicted - - beyond a reasonable doubt - - of the murder-for-hire case which resulted in a guilty plea to witness tampering.

aggravating factor for the imposition of the death penalty. More importantly, 200.033 does not permit it. *See also* Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668 (1990) (introduction of evidence relating to crime that defendant had previously been acquitted of committing did not violate double jeopardy or due process). Therefore, Defendant's argument must fail.

CONCLUSION

Based on the foregoing, the State of Nevada respectfully requests that this Court grant its Motion to Admit Other Bad Acts.

DATED this 18th day of November, 2009.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ Robert J. Daskas
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 18th day of November, 2009, by facsimile transmission to:

E. BRENT BRYSON, ESQ.
FAX: (702) 364-1442

BY: /s/ Jennifer Georges
Secretary for the District Attorney's Office

08F19497X/jg/MVU

TO:E. Brent Bryson, Esq. COMPANY:

Exhibit "1"

Defendant Randolph argues that the prior case is inadmissible because the records related to it have been destroyed. Opposition at 8-9. Defendant's argument is wholly contradicted by the Nevada Supreme Court's opinion in Zana. The *records*, even if they existed, are inadmissible. In Zana, the Court specifically stated that the district court's exclusion of testimony regarding *the proceedings* that were subject to the sealing orders secured the integrity of the sealing orders. The State did not use records of prior proceedings against Zana; instead, the State admitted *testimony* of the prior events against Zana and illuminated Zana's pattern of behavior without implicating the sealed records. *Id.* at 247-248. Here, the State will similarly introduce evidence of the prior case through live witness testimony; neither the State nor the defense would be permitted to introduce records of the prior proceedings. Therefore, Randolph's argument that the case is inadmissible because the records do not exist is legally flawed and must fail.

THE ADMISSION OF RANDOLPH'S PRIOR MURDER CASE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

Finally, Defendant Randolph asserts that the "State is essentially asking to introduce 'proof' that Randolph committed the Utah murder in a capital murder trial here in Las Vegas, **thus triggering an aggravating factor** for the imposition of the death penalty." Opposition at 10 (emphasis added). Defendant makes the novel and unsupported argument that doing so would be a Double Jeopardy violation.

NRS 200.033 delineates the exclusive list of "aggravating circumstances" which make a defendant death eligible. A prior murder acquittal does not qualify as an aggravating circumstance. More importantly, on February 04, 2009, the State filed its Notice of Intent to Seek Death Penalty[2] in this case pursuant to Nevada Supreme Court Rule 250. The State alleged three aggravating circumstances, none of which are the prior Utah murder acquittal. Thus, contrary to Defendant's assertion, the State is not using the Utah murder to trigger an

[2] A copy of the State's Notice of Intent to Seek Death Penalty is attached as Exhibit 2.

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CLERK OF THE COURT

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
DAVID L. STANTON
Chief Deputy District Attorney
Nevada Bar #003202
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
THOMAS WILLIAM RANDOLPH, #2703406,
Defendant.

CASE NO: C250966
DEPT NO: XXIII

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through DAVID L. STANTON, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033, and declares its intention to seek the death penalty at a penalty hearing in the instant case. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. *The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree.* Nev. Rev. Stat. §200.033(12).

In the instant case, Defendant is charged in Counts 2 and 4 of the Indictment with Murder with Use of a Deadly Weapon for the killings of Sharon Causse Randolph and Michael James Miller, respectively. The State will rely on the jury's verdicts for Counts 2 and 4 to prove this aggravating circumstance against Defendant.

2. *The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value. NRS 200.033(6).*

The Defendant, either by himself or in conjunction with his co-conspirator, Michael James Miller, murdered SHARON CAUSSE RANDOLPH for the purpose of receiving proceeds from life insurance policies taken out on the life of SHARON CAUSSE RANDOLPH, wherein the Defendant was the named beneficiary and/or Defendant was to be the ultimate beneficiary of the life insurance proceeds. Those insurance polices include, but are not limited to, the following: (1) Protective Life (ZL9938662); (2) Monumental Life Insurance Company (MZ45000300-194); (3) Stonebridge Life (82AK3W4465); and (4) Prudential Financial (L4286728Y). Copies of each of these insurance policies have been provided to defense counsel. The investigation regarding the actual number of policies is ongoing, and any additional policies will be provided to the defense if and when discovered.

3. *The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of: (b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony. NRS 200.033(2).*

On or about May 30, 1989, Defendant Thomas Randolph pleaded guilty to witness tampering, a third-degree felony, in Second District Court in Farmington, Utah. On or about June 27, 1989, Randolph was sentenced to up to five (5) years in prison and fined $10,000 by Judge Douglas L. Cornaby on the witness tampering conviction. The guilty plea and conviction arose out of Defendant Randolph's solicitation of an undercover police agent to have a trial witness, Eric Tarantino, killed. Defendant Randolph, between December 1988 and January 1989, while awaiting trial on a murder charge, discussed with Davis County Jail cell mate Steve Williams ways to stop Tarantino from testifying in Randolph's murder trial. Tarantino had already testified against Randolph in a preliminary hearing. Williams reported his conversations with Randolph to the Davis County Sheriff's office, and officials worked with Williams to record several conversations he had with Randolph. Later, Williams was let out of jail on the pretext of an early release. Randolph made several telephone calls to a hotel room where Williams was staying after Williams was released, all of which were recorded. During one of the calls, Randolph was asked if he was sure he

"wanted this guy whacked," and Randolph responded affirmatively. Williams later met with Randolph's girlfriend, Wendy Moore, in Layton, Utah, and Moore (at Randolph's direction) provided Williams with the title to an automobile as a down payment to carry out the slaying of Tarantino. Tarantino ultimately testified against Randolph in a murder trial in which Randolph was charged with the November 7, 1986 killing of Randolph's then-wife, Rebecca Gault Randolph.

DATED this 4th day of February, 2009.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ David L. Stanton
DAVID L. STANTON
Chief Deputy District Attorney
Nevada Bar #003202

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 4th day of February, 2009, by facsimile transmission to:

GABRIEL GRASSO, ESQ.
FAX: (702) 868-5778

BY: /s/ Jennifer Georges
Secretary for the District Attorney's Office

08F19497X/jg/MVU

TO:E. Brent Bryson, Esq. COMPANY:

Exhibit "2"

216 P.3d 244
(Cite as: 216 P.3d 244)

C

Supreme Court of Nevada.
Mark R. ZANA, Appellant,
v.
The STATE of Nevada, Respondent.
No. 50786.

Sept. 24, 2009.

Background: Defendant was convicted in the Eighth Judicial District Court, Clark County, Jackie Glass, J., of open or gross lewdness, three counts of lewdness with a child under the age of 14, and six counts of possession of visual representation depicting sexual conduct of a person under the age of 16. He appealed.

Holdings: The Supreme Court, Douglas, J., held that:
(1) other-acts testimony of alleged victims of prior incidents involving defendant was admissible even though the records of the court proceedings that followed the prior incidents were sealed or expunged;
(2) juror's independent search of the Internet for a particular pornographic website that was mentioned during trial amounted to the use of extrinsic evidence in violation of the Confrontation Clause;
(3) such juror misconduct did not prejudice defendant; and
(4) defendant was not entitled to severance of charges of lewdness with a child under the age of 14 from charges of possession of visual representation depicting sexual conduct of a person under the age of 16.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⟹374

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k374 k. Proof and Effect of Other Offenses. Most Cited Cases
Other-acts testimony of alleged victims of prior incidents involving defendant was admissible at a lewdness trial even though the records of the court proceedings that followed the prior incidents were sealed or expunged; trial court was not required to ignore the recollections of defendant's accusers, and testimony regarding the court proceedings that were subject to the sealing or expungement orders was excluded. West's NRSA 179.285.

[2] Criminal Law 110 ⟹1156(5)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156 New Trial
110k1156(5) k. Misconduct of or Affecting Jury. Most Cited Cases
A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the trial court.

[3] Criminal Law 110 ⟹1158.35

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.35 k. Motion for New Trial. Most Cited Cases
Absent clear error, a trial court's findings of fact in connection with a motion for a new trial based upon juror misconduct will not be disturbed.

[4] Criminal Law 110 ⟹1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
Where juror misconduct involves allegations that the jury was exposed to extrinsic evidence in viola-

tion of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⇨925(1)

110 Criminal Law
110XXI Motions for New Trial
110k924 Misconduct of or Affecting Jurors
110k925 In General
110k925(1) k. In General. Most Cited Cases

Criminal Law 110 ⇨1174(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(2) k. Misconduct of Jurors in General. Most Cited Cases
To justify a new trial on the ground of juror misconduct, a defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict.

[6] Criminal Law 110 ⇨1174(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(2) k. Misconduct of Jurors in General. Most Cited Cases
When analyzing extrinsic material to determine whether a jury's exposure to the material resulted in prejudice to a defendant, so as to justify a new trial on the ground of juror misconduct, the trial court is required to objectively evaluate the effect it had on the jury and determine whether it would have influenced the average, hypothetical juror.

[7] Criminal Law 110 ⇨1174(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(2) k. Misconduct of Jurors in General. Most Cited Cases
Several factors guide an inquiry into whether a jury's exposure to extrinsic material resulted in prejudice to the defendant and thus warrants a new trial on the ground of juror misconduct, including how long the jury discussed the extrinsic material, when that discussion occurred relative to the verdict, the specificity or ambiguity of the information, and whether the issue involved was material.

[8] Criminal Law 110 ⇨662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of Trial. Most Cited Cases
Juror's independent search of the Internet for a particular pornographic website that was mentioned during trial amounted to the use of extrinsic evidence in violation of the Confrontation Clause at a trial for lewdness with a child under the age of 14 and possession of visual representation depicting sexual conduct of a person under the age of 16. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⇨1168(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1168 Rulings as to Evidence in General
110k1168(2) k. Reception of Evidence. Most Cited Cases
Juror's independent search of the Internet for a particular pornographic website that was mentioned during trial, which amounted to the use of extrinsic

evidence in violation of the Confrontation Clause, did not prejudice defendant at a trial for open or gross lewdness, lewdness with a child under the age of 14, possession of visual representation depicting sexual conduct of a person under the age of 16; the search was fruitless, the jury only briefly discussed the search and then continued with its deliberation for at least a few more hours, and the search was highly ambiguous. U.S.C.A. Const.Amend. 6.

|10| Criminal Law 110 ⟹620(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(3) Severance, Relief from Joinder, and Separate Trial in General
110k620(6) k. Particular Cases. Most Cited Cases

Defendant was not entitled to severance of charges of lewdness with a child under the age of 14 from charges of possession of visual representation depicting sexual conduct of a person under the age of 16; evidence of pornography found on defendant's computer was admissible to prove the intent element of the lewdness charges, and evidence of defendant's lewd behavior was admissible to prove the knowing and willful element of the pornography charges. West's NRSA 200.730, 201.230.

|11| Criminal Law 110 ⟹620(4)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(3) Severance, Relief from Joinder, and Separate Trial in General
110k620(4) k. Discretion of Court. Most Cited Cases

Criminal Law 110 ⟹1148

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1148 k. Preliminary Proceedings. Most Cited Cases

Joinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. West's NRSA 173.115.

|12| Criminal Law 110 ⟹620(5)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(3) Severance, Relief from Joinder, and Separate Trial in General
110k620(5) k. Grounds. Most Cited Cases

Charges with mutually cross-admissible evidence are properly joined because in such a situation the accused would fare no better from a severance and trial of the severed counts independently. West's NRSA 173.115.

***245** Christopher R. Oram, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, Steven S. Owens, Chief Deputy District Attorney, and Thomas M. Carroll, Deputy District Attorney, Clark County, for Respondent.

Before the Court En Banc.

OPINION

By the Court, DOUGLAS, J.

This appeal presents three main issues. First, we consider whether testimony regarding prior bad acts is admissible when the resulting court proceedings were sealed or expunged. Second, we address

whether the jury committed misconduct in this case, and if so, whether such misconduct warranted a new trial. Third, we discuss whether the district court erred in denying the motion to sever the lewdness counts from the child pornography counts.[FN1]

FN1. Appellant also argues that: (1) he is entitled to a new trial based upon the introduction of inadmissible evidence of other crimes, wrongs, or acts; (2) the testimony about his prior bad acts was inadmissible pursuant to NRS 48.045(2); (3) the district court erred when it permitted several instances of hearsay testimony to be admitted; (4) the district court erred when it failed to suppress images obtained from his computer because the search warrant did not contain sufficient information to support probable cause; (5) insufficient evidence supported his conviction of possession of visual representation depicting sexual conduct of a person under the age of 16; (6) the district court erred when it failed to dismiss the child pornography counts based on improper pleading and notice; and (7) his convictions must be reversed based upon the cumulative errors committed during trial. We have carefully considered these issues and conclude that these additional challenges are without merit.

*246 We conclude that the district court may permit testimony that is confined to a witness's personal experiences so long as the witness does not rely on the previously sealed or expunged court proceedings and does not indicate that such proceedings took place. Next, we conclude that any jury misconduct that occurred in this case did not prejudice the verdict, and thus, a new trial was not warranted. Finally, we conclude that the district court did not abuse its discretion by denying the motion to sever the lewdness counts from the pornography counts because the evidence presented in each case was admissible in the other case. We therefore affirm appellant Mark R. Zana's conviction.

FACTS AND PROCEDURAL HISTORY

The case before us arose out of multiple allegations by several female students that Zana, a fifth-grade teacher, had touched them inappropriately while they were under his supervision. In total, six girls came forward alleging Zana would touch their breasts and/or invite them to place their hand in his pocket to get candy. During the investigation of these allegations, two previous allegations against Zana came to light.

In 1992, while Zana was living in Pennsylvania, he was accused of pinning a 13-year-old girl against his bed and fondling her breast. The case against Zana was concluded when he agreed to a plea bargain that prohibited him from teaching minors. The records of the case were subsequently expunged pursuant to the plea agreement and in accordance with Pennsylvania law.

Then, in 1998 while working as a teacher in Henderson, Nevada, Zana was accused of enticing a second-grader to touch his penis by telling her she could retrieve candy from his pocket. Criminal proceedings were also initiated as a result of the allegation in Henderson, but that case was dismissed because the victim's parents did not want her to have to testify. The records of the dismissed Henderson case were subsequently sealed. Prior to trial, the State filed a motion to unseal the records of the 1998 Henderson case, arguing it was going to prosecute Zana for that incident as well. The justice court unsealed the records for that limited purpose.[FN2]

FN2. Zana appealed the unsealing of these records to the district court and the record does not disclose the issue's ultimate resolution. Moreover, no party contests, and we decline to consider, the propriety of unsealing these records. We do note, however, that to inspect sealed records of a

defendant's prior offense, the State must demonstrate that based on newly discovered evidence it has sufficient evidence to reasonably conclude that the defendant will be tried for that prior offense. NRS 179.295; *see Walker v. Dist. Ct.*, 120 Nev. 815, 820, 101 P.3d 787, 791 (2004) (implying that the State's failure to arrest for prior offense used to justify record's unsealing suggests unsealing was error). Here, the State never charged Zana in the 1998 Henderson case.

The State charged Zana with 9 counts of lewdness with a child under the age of 14. He was also charged with 12 counts of possession of visual representations depicting sexual conduct of a person under the age of 16 stemming from pictures investigators found on his computer.

At trial, the State introduced the prior allegations against Zana through the testimony of his alleged victims pursuant to NRS 48.045. Through this testimony, the State sought to prove Zana's motive in touching his female students and to rebut Zana's claims that the touching was accidental, misinterpreted, or an isolated mistake. Because records of the previous incidents were sealed or expunged, the district court limited the victims' testimony to Zana's actual conduct and the witnesses' experiences, and excluded testimony regarding subsequent charges and *247 judicial proceedings. FN3

FN3. One witness tangentially referenced a prior court proceeding, but the reference was inadvertent, brief, and the district court acted quickly to rectify the situation. Outside the presence of the jury, the district court admonished the witness and subsequent witnesses not to refer to any court proceeding. Because the reference was fleeting and did not explicitly refer to a court case, we conclude its erroneous admission was harmless and do not address it further.

DISCUSSION

First, we will discuss the admissibility of testimony regarding prior bad acts by the defendant, where the records of the criminal proceedings resulting from those acts have been sealed or expunged. Next, we will address whether jury misconduct occurred in this case and, if so, whether it was prejudicial and, thus, warranted a new trial. Finally, we will consider whether the district court should have granted Zana's motion to sever the lewdness charges from the pornography charges.

Sealed or expunged cases

[1] Zana contends that the testimony about the allegations in Pennsylvania and Henderson were improperly admitted because these cases had previously been sealed or expunged. Zana believes that the testimony about these previous allegations violated the courts' prior orders to seal or expunge the records. We disagree.

When a court orders a record sealed, "[a]ll proceedings recounted in the record are deemed never to have occurred." NRS 179.285. This fiction permits the subject of the sealed proceedings to properly deny his or her arrest, conviction, dismissal, or acquittal in connection with the proceedings. *See Vilas v. State*, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996). In this way, sealing orders are intended to permit individuals previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions. *See Baliotis v. Clark County*, 102 Nev. 568, 570-71, 729 P.2d 1338, 1340 (1986). "It is clear, however, that such authorized disavowals cannot erase history. Nor can they force persons who are aware of an individual's criminal record to disregard independent facts known to them." *Id.* at 571, 729 P.2d at 1340.

Thus, as we have previously observed, while a sealing order erases many of the consequences that potentially flow from past criminal transgressions, it

is beyond the power of any court to unring a bell. *See id.* For example, in *Baliotis*, the Las Vegas Metropolitan Police Department recommended denial of a convicted felon's application for a private detective's license based on his prior felonies even though records of the applicant's felony convictions were sealed. *Id.* at 569, 729 P.2d at 1339. This court upheld the recommendation because the officers investigating the applicant's character had personal knowledge of the applicant's criminal history. *Id.* at 570-71, 729 P.2d at 1339-40. In so doing, we respected the sealing statute's limited effect: it erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others. *See id.* at 571, 729 P.2d at 1340.

Here, the district court properly excluded testimony regarding the court proceedings that were subject to the sealing orders in order to preserve the effect of the orders, while it correctly admitted testimony to which the sealing orders did not apply. Neither the Pennsylvania order nor the Henderson order erased the witnesses' memories of Zana's inappropriate conduct. Just as the sealing statute did not require the licensing commission in *Baliotis* to disregard the investigating officers' independent knowledge, it does not require the district court to ignore the recollections of Zana's accusers. Although statutes empower courts to seal a proceeding's records, individual memories of events outside the courtroom are beyond such judicial control.

Moreover, the district court's exclusion of testimony regarding the proceedings that were subject to the sealing orders secured the integrity of the sealing orders. Coincident with the purpose of the sealing statutes, the State did not use records of prior proceedings against Zana. Instead, the State admitted testimony of the prior events *248 against Zana and illuminated Zana's pattern of behavior without implicating the sealed records.

We therefore conclude that the district court did not err in admitting the testimony. Instead, it properly restricted the scope of the testimony to preserve the statutory effect of the previous cases' sealing or expungement orders while allowing relevant testimony.

Jury misconduct

Zana contends the district court erred when it denied his motion for a mistrial in the face of juror misconduct. Although the juror's behavior was inappropriate, we conclude that the misconduct did not prejudice the jury's decision and, thus, affirm the district court's decision to deny the motion for mistrial.

While investigating the allegations of inappropriate touching, investigators discovered what appeared to be pornographic pictures of young females on Zana's home computer. The central question left to the jury's determination was the actual age of the females pictured in the photographs relating to the counts of possession of visual representation depicting sexual conduct of a person under the age of 16. At trial, there was competing expert testimony regarding the age of the females.

The jury deliberations in this case began on a Friday and finished on a Monday. While at home over the weekend, one juror engaged in an Internet search for a particular pornographic website that was mentioned during the trial.[FN4] Despite the juror's efforts, he was unable to locate the website. Upon returning on Monday to deliberate, he advised his fellow jurors of his fruitless search but came to no conclusion about the meaning of that failure. After discussing the search for a short time, the jury returned to its deliberations and rendered a verdict a few hours later.

> FN4. Zana also characterized additional juror behavior as misconduct, including attempting to guess the ages of churchgoers and testing the accessibility of a seated man's pants pocket. Because we conclude such behavior is not misconduct but simply

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> "observation based on matters generally experienced by people in their everyday lives," we confine our discussion of the jury misconduct to the Internet search. *Meyer v. State*, 119 Nev. 554, 568, 80 P.3d 447, 458 (2003).

When Zana later learned of the juror's online research, he moved for a mistrial. At the hearing on the matter, every juror available testified about the Internet search and the resulting discussion. The district court then concluded that while the juror had committed misconduct by conducting his own investigation, the information obtained through the juror's independent research was vague, ambiguous, and only discussed for a brief time, and therefore, the misconduct was not prejudicial. Based on this conclusion, the district court denied the motion for a mistrial.

[2][3][4] "A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed." *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) (internal citations omitted). "However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." *Id.* at 561-62, 80 P.3d at 453.

[5][6][7] To justify a new trial, "[t]he defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict." *Id.* at 565, 80 P.3d at 456. When analyzing extrinsic material to determine whether the jury's exposure to the material resulted in prejudice to the defendant, the district court is required to objectively evaluate the effect it had on the jury and determine whether it would have influenced "the average, hypothetical juror." *Id.* at 566, 80 P.3d at 456. Several factors guide the juror prejudice inquiry, including how long the jury discussed the extrinsic material, when that discussion occurred relative to the verdict, the specificity or ambiguity of the information, and whether the issue involved was material. *Id.*

*249 [8] We conclude that the juror's independent search of the Internet did amount to the use of extrinsic evidence in violation of the Confrontation Clause. However, we conclude that one juror's inability to locate a website mentioned during trial is not so prejudicial as to necessitate a new trial.

[9] Upon review of the jurors' testimony at the hearing, it is clear that the jury only briefly discussed the fruitless search and then continued with its deliberation for at least a few more hours. Moreover, the fruitless search was highly ambiguous; there are many possible interpretations of the extrinsic information the juror presented and this resulted in little, if any, probative information being relayed to the other jurors. Furthermore, although the issue that motivated the search-the ages of the females depicted in the photographs on Zana's computer-was material, the fruitless search could in no way affect the jury's inquiry. Because the search's implications are ambiguous, it could not speak to a material issue in the case. Information so ostensibly irrelevant could not prejudice the average, hypothetical juror.

For the foregoing reasons, we conclude that the district court's denial of Zana's motion for a mistrial, based on juror misconduct, was not an abuse of discretion.

Joinder of charges

[10] We now turn to Zana's argument that the district court erred in denying his motion to sever the lewdness charges from the pornography charges. Zana contends that because the pornography charges are unconnected with the lewdness charges, the district court should have severed the two. However, given the cross-admissibility of the evidence in the two cases, we disagree.

[11] " '[J]oinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.' " *Tillema v. State*, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996) (quoting *Robins v. State*, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990)). Criminal charges are properly joined whenever: (1) the acts leading to the charges are part of the same transaction, scheme, or plan or (2) the evidence of each charge would be admissible in the separate trial of the other charge. NRS 173.115; *Mitchell v. State*, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989); *see generally Robinson v. United States*, 459 F.2d 847, 855-56 (D.C.Cir.1972).

[12] Charges with mutually cross-admissible evidence are properly joined because in such a situation "the accused would fare no better from a severance and trial of the severed counts independently." *Robinson*, 459 F.2d at 855-56. Moreover, severance in such a case would naturally result in separate trials presenting identical evidence and consequentially result in needless judicial inefficiency. *See Robinson*, 459 F.2d at 856. Here, we conclude that joinder was proper because, had the district court granted the motion to sever the lewdness counts from the pornography counts, the evidence of each charge would have been admissible in the separate trial of the other charge.

First, the lewdness charge required the State to prove that Zana touched his young victims for the purpose of gratifying his lusts, passions, or sexual desires. NRS 201.230. The pornography found on Zana's computer suggests that Zana found pornographic images of young females sexually gratifying. The pornography evidence indicates Zana intentionally touched his female students for the purpose of satiating his sexual appetite, and that the touching was not by mistake or accident. Therefore, evidence of the pornography was admissible to prove the mental state required for the lewdness charge.

Likewise, evidence of Zana's lewd behavior with young girls under his supervision suggests that the pornography found on Zana's computer was not the result of an accident or mistake. To prove the underage pornography charge against Zana, the State had to prove that he knowingly and willfully possessed the materials. NRS 200.730. Evidence that he inappropriately touched young girls suggests contact with young girls sexually gratified Zana. It is reasonable to then infer that he did not possess pornographic photographs of young females accidentally, but rather knowingly and willfully downloaded the photographs to satisfy the sexual desires *250 his inappropriate touching evidences. Therefore, evidence of Zana's lewd behavior was admissible to prove the knowing and willful element of the pornography charge.

Thus, because evidence of the two charges was cross-admissible, the district court did not abuse its discretion in denying Zana's motion to sever the charges.

CONCLUSION

We conclude that the district court properly exercised its discretion in admitting the testimony of Zana's prior victims, denying his motion for a mistrial based on juror misconduct, and denying his motion to sever lewdness and pornography charges. Accordingly, we affirm the judgment of conviction.

We concur: HARDESTY, C.J., and PARRAGUIRRE, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ.
Nev.,2009.
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EXHIBIT "F"

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DISTRICT COURT
CLARK COUNTY, NEVADA

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CLERK OF COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

THOMAS WILLIAM RANDOLPH,

Defendant.

CASE NO. C250966

DEPT. NO. XXIII

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

FRIDAY, JULY 30, 2010

RECORDER'S TRANSCRIPT RE:
HEARING: PETROCELLI

APPEARANCES:

For the State: ROBERT J. DASKAS, ESQ.
Chief Deputy District Attorney

For the Defendant: E. BRENT BRYSON, ESQ.
YALE L. GALANTER, ESQ.

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RECORDED BY: DALYNE EASLEY, COURT RECORDER

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CLERK OF THE COURT

FRIDAY, JULY 30, 2010, 9:42 A.M.

* * * * *

THE COURT: We're on the record on State versus Randolph, case C250966. Earlier this morning I was given a motion which was filed in Court by the Defense which is a motion to exclude the State's witness William McGuire.

Counsel?

MR. GALANTER: Morning, Your Honor, Yale Galanter, Brent Bryson and Melinda Weaver all on behalf of Thomas Randolph who is present.

THE COURT: Morning Mr. Randolph.

THE DEFENDANT: Hi.

THE COURT: All right Counsel, I did have a chance to review the motion.

MR. BRYSON: Thank you, Your Honor, may I proceed?

THE COURT: Yes, sir.

MR. BRYSON: As this Court is aware we have been waiting on the results of the Utah court to determine whether or not they were going to unseal some expunged records up in two cases up in Utah. And the ruling came down from the Utah court that they were not going to do so, the cases would be -- were to remained sealed.

Part of the order also focused on whether this was a procedural or a substantive issue and the Utah courts determined that it was a substantive issue. Based upon that ruling and a conversation that I had with the State's attorney, Mr. Daskas, he informed me that at that time they intended to call a former prosecutor on the murder case, one William McGuire, who was also an individual that was assisting in the Utah case as far as trying to get these records unsealed, the expunged records unsealed. So he has a close nexus to this and has demonstrated, I would submit to this Court, an actual bias in continuing to attempt to

facilitate a prosecutorial position.

Now, given the Utah court's ruling and the conversation with Mr. Daskas the motion was filed and it was predicated basically on three very simple principles that would appear to be well settled in Utah, and I would also submit to be well settled under our case law under the Zana Case. And the first portion of that would be the Utah Code Title 77, Chapter 18, Section 14, Subsection 5 of the Utah laws as it pertains expungement. And Subsection 5 states, and I quote, no state, county or local entity agency or official may after receiving service of an expungement order divulge information contained in the expunged portion of the record. So it's obvious that Mr. McGuire fits the official portion of this mandate, this statutory mandate.

Now, the case that I cited for the proposition that Mr. McGuire should not be allowed to testify, which is the Norris Case, 48 P.3d 872, 2001, Utah, states in the Head Note 7 in the body as follows, an expungement order prevents persons who have access to the sealed record or whose testimony is bolstered by reference to it from recreating the record in proceedings subsequent to the expungement. Such an order does not preclude witnesses who have knowledge independent of the expunged record from testifying on a subsequent occasion. Now, that language tracks very closely to the language in the Zana Case where it talks about how the expungement can wipe out, for legal purposes, reference to the records and you can't talk about the record but it says and the quote was, it erases an individuals involvement with the criminal justice system of record not his actual conduct and certainly not his conduct effects on others. So, with the Zana court in essence our Supreme Court and Zana said was if you got some personal knowledge that isn't directly pertaining to the sealed records or expunged records and you don't make

any reference to them you can talk about your own personal information such as the witness. In that particular case it had to do with some children that had been molested.

It's a little different than what we've got here because first of all we have the statutory mandate. The Zana Case they're talking about individual percipient witnesses and alleged victims in that case. This particular witness that the State is wanting to call is an official and is clearly barred from testifying under Subsection 5 of the aforementioned code that I cited for this Court.

Second of all the Utah case that I cited as authority also would preclude this witness from testifying. This witness was also a defendant in a civil rights case that was ultimately dismissed and was required to sign a non-disclosure of information as it pertains to that lawsuit.

And furthermore what this witness in essence has to say is based upon what other people have told him, for the most part. Interviews, he has no first hand personal knowledge of the events which transpired there. In other words, he was not an eyewitness to any alleged misconduct of Mr. Randolph. He may have participated in the investigation and actually not may have, he did have based upon conversations with the State's counsel, with Mr. Daskas. But those still don't get passed the hearsay. That's all predicated, his investigation, his answers are all hearsay. So for all those reasons, statutory reason, the case law, the order that the Utah Supreme stated we're not unsealing these records and the fact that anything he's got to say is in essence hearsay all mandate that he should not be allowed to testify in this case. I mean, first and foremost as this Court knows is way back when when the Constitution was drafted, I mean the whole idea was a fair trial for an individual. There has been no statutory amendments, there's been no Constitutional

amendments that I'm aware of that say, you know what, an individual is still not entitled to a fair trial. This man was acquitted of charges. An acquittal must mean something in this State as far as his innocence and what the State can prove. They had their shot in Utah, it didn't work. They should not now be allowed to come down and partner up with Nevada and try to bring in things that clearly should be excluded.

Thank you.

THE COURT: Counsel?

MR. DASKAS: Good morning, Judge, Robert Daskas on behalf of the State. If I might, Judge, I want to back up procedurally and sort of remind the Court, with all due respect I'm not suggesting you don't realize this, but remind everyone how we got here.

We, the State, filed the motion for other bad acts and we sought to admit a previous Utah murder case that had been filed against Mr. Randolph for which he was tried and acquitted. There was an opposition filed by the defense in this case and in the opposition, and attached to it, the defense attorneys, these two gentlemen in Court, attached to that opposition a couple of records that they now complain shouldn't be revealed because that case was sealed and expunged. The defense attorneys attached a minute entry order from Utah and they attached a letter from an A.G. in Utah and the defense attorneys in this case attempted to use those documents to suggest to you that we the State couldn't prove the other case by clear and convincing evidence. So now they walk into Court and they say, Judge, it would be a violation by the State to introduce any records from a Utah case that was sealed and expunged yet these two gentlemen in Court are introducing documents, attaching them to an opposition and want you to rely on those

documents they say should have never been revealed because they were sealed and expunged. They can't have it both ways.

Having said that, we are here because this is a Petrocelli hearing, as you know, and I hear Mr. Bryson complain that if Mr. McGuire testifies he would be testifying to hearsay. Petrocelli, the case itself, said that the State in another bad act motion is entitled to do an offer of proof. Judge, in 15 years of working for the D.A.'s office, every time I've done a Petrocelli hearing I've stood up in court and done an offer of proof. And I'm certainly not quarreling with a hearing in this case, I think it's the right thing and the cautious thing to do is to call witnesses but the point is this, Petrocelli itself and a number of subsequent cases from Nevada say that we can do an offer of proof. An offer of proof necessarily means you're relying on hearsay. If I get to stand up in court and tell you what witnesses would say about that other bad act its hearsay. If I call a witness who tells you what other witnesses would say as part of that offer of proof its hearsay. It's allowed in Nevada. I would cite this Court to the Redeker Case and, I apologize, this is a Westlaw citation, 2008, Westlaw 6102007 which says in that case the District Court received an offer of proof in lieu of a formal Petrocelli hearing. And the court went on to say the trial court did not abuse its discretion in doing so. The McLellan Case, that's M-C-L-E-L-L-A-N v. State, 182 P.3d, 106, a 2008 case which states, under Petrocelli clear and convincing proof of collateral acts can be established by an offer of proof. That's all we're doing in this case. So for the defense to suggest there's some procedural preclusion from calling a witness to do the offer of proof is simply wrong. We do it all the time.

Mr. Bryson has suggested to you that somehow this expungement order from Utah prevents us from calling this witness. Judge, I agree that when this

case goes to trial if the motion for other bad acts is admitted we could never call a witness to talk about records from the Utah case nor could we introduce records from the Utah case, we are not going to do that. This is a hearing to determine if we can establish by clear and convincing evidence the existence of the previous murder case. So the argument that somehow we're violating an expungement order is also wrong. I can tell the Court that Mr. McGuire is one of the two prosecutors from the 1986 murder case that was tried against Mr. Randolph. Mr. McGuire personally visited the scene of the murder, her personally interviewed witnesses who had first-hand knowledge, for example Eric Tarantino, he is the gentlemen that Mr. Randolph solicited to kill Becky Gault, his wife in Utah.

THE COURT: So if this -- if the Court granted your motion for prior bad acts would Mr. Tarantino be an individual who you would call at the time of trial?

MR. DASKAS: Absolutely.

THE COURT: And is that what you're going to get into with Mr. McGuire?

MR. DASKAS: Absolutely, Judge. We would call -- we wouldn't call Mr. McGuire to relay hearsay statements to the jury, we recognize that we can't do that, and you hit the nail on the head, we would be required to and we would call Mr. Tarantino. He is alive and well, he's available to testify and we recognize we couldn't prove the other bad acts evidence without his testimony among others, so we would certainly do that. And, quite frankly, Judge, we recognize that if we can't call him, if he's not available, if he's not cooperative we can't prove the case. We would not even seek to introduce that other bad act evidence. So --

THE COURT: So Mr. McGuire would also indicate as the offer of proof the other witnesses you would actually call at the time of trial.

MR. DASKAS: Yes.

THE COURT: Obviously we're going to have those limitations --

MR. DASKAS: That's correct.

THE COURT: -- because of the expungement.

MR. DASKAS: That's correct, Your Honor.

And, Judge, one of the primary reasons Mr. McGuire is here is this, I mention that the defense attorneys in this case attached to their opposition a couple of exhibits: there's a minute entry order which is dated July 14, 1992, they also attached what's entitled a ruling on request to review evidence which is dated October 6, 1989, and the defense attorneys also attached a letter from the Office of the Attorney General in Utah dated January 10, 1994. By virtue of those documents, the defense again is suggesting we can't meet our clear and convincing burden that we have to meet. Mr. McGuire can directly address two of those three documents. He cannot address the A.G. letter because it would be speculation for Mr. McGuire to tell you what he thinks that deputy A.G. meant when he wrote that letter but we would call Mr. Torgenson at what ever date this Court gives us to finish this hearing. But Mr. McGuire can certainly testify directly to the procedural matters that occurred after the acquittal in the Utah murder case.

THE COURT: And the witnesses who are still available to testify regarding their recollections, correct?

MR. DASKAS: Yes, Your Honor, they are, yes, Judge. So it's interesting because remember what happened way back when, we filed our motion for further bad acts, the defense filed their opposition and at some point there was a meeting in Chambers and a discussion on the record and the defense attorneys told you, hey Judge, wait a minute, we can't be ready for this other bad act hearing unless and until we the defense attorneys have access to the records from Utah. That's what

they told you that they wanted the witness statements, the transcripts, the trial transcripts and so we all agreed we're gonna -- we the State will make efforts to get that so everybody can have access to those things. Then we learn the defense, and I use that term collectively whether it's Mr. Randolph's attorneys in Utah or whether these two gentlemen are involved, I don't know and it doesn't matter but the defense collectively went to Utah and said wait a minute, we don't want those records unsealed. So while they're walking into Court telling you one thing they're in Utah they, meaning the defense collectively, doing something else. And surprisingly to me they attached the very sealed records about which they now complain to their opposition. So they can't have it both ways. Either they want someone to come in and explain to this Court what these documents mean or if we're going to use their logic Judge that you can -- you have to imagine these never happened then take the exhibits they attached to their opposition and throw them away. You can not rely on those because according to the defense attorneys those were sealed and expunged and we have to pretend they didn't exist. Well if that's the case then we have already met our burden, our motion should be granted and we're all done. I suspect that's not what they want which means we need to call this witness to explain what these things mean, the very things they attached to their opposition.

If you have any questions Judge, I'm happy to answer them otherwise I'll submit it.

THE COURT: I don't. Counsel?

MR. BRYSON: Yes, briefly. Counsel apparently is insinuating, first of all, that there's some kind of nefarious conduct that's going on as a defense team, collectively in game playing with this Court. That's not the case. Anything that was done on behalf of Mr. Randolph in this State has been completely done within

ethical mandates and in good faith. And I noticed that Mr. Daskas didn't question about that over here so I'm going assume he's going to agree with that statement and so will this Court. Regarding the Utah procedure, what was happening in the Utah procedure certainly there's nothing in that order to suggest the order from the judge that anyone was playing any kind of games but that in fact Mr. Randolph simply sought to enforce the terms of his plea agreement which were that his records were going to be expunged, and indeed if they had been opened up the whole thing could have been opened up.

THE COURT: I agree with Mr. Bryson, I mean there's nothing in the Utah order to indicate that Mr. Randolph did not have a right --

MR. BRYSON: Thank you.

THE COURT: -- to make the objections he did.

MR. DASKAS: And Judge, if I might, I certainly didn't mean to suggest anything --

THE COURT: Okay.

MR. DASKAS: -- nefarious went on. My only argument had to do with the fact that they can't have it both ways. That's all. That's all, Judge.

MR. BRYSON: As to that, to that assertion, in the State's initial motion in Head Note 3 on Page 5 it says, the facts from the Utah case are gleaned from trial transcripts, officer's reports, and witness statements. That's what the State said. Those are all certainly covered by the expungement order. There can be no doubt about that. Let's read it again, trial transcripts, officer's reports --

THE COURT: I read it, Counsel, thank you.

MR. BRYSON: -- and witness statements. Now, they ask us as far as -- or they argue that because we attached certain documents. First of all it was in

response to their motion only to show that these are the only documents that we have. We can't possibly cross-examine effectively, first of all, Mr. Terrantino because all of the impeachment testimony and transcripts are sealed or destroyed by the expungement. We don't have any idea. The material pieces of evidence that were used for impeachment purposes are gone, number one, the alleged -- well, not the alleged, the weapon that was used by the -- to effectuate the death of the decedent in that case. And it had special -- there was special ballistic testimony and things of that nature that we can't -- we have no access to. His lead attorney on that case, we can't talk to, he's dead. So, effectively we attached two documents and one is an opinion letter from the A.G. which is something we would certainly never intend to submit as evidence in any kind of trial, at all, it was strictly for the point of saying, we're in a position here, without full disclosure of all prior testimony and evidence against our client we can't effectively rebut this testimony that's coming in. That's from the A.G.

And as far as the judge's minute order, it had to do with what the judge perceived to be prosecutorial and investigatorial [sic] body's improprieties in handling the case. Not to the truth or innocence -- or the guilt or innocence of our client, which goes to the spirit and meaning of the expungement order, but the process that this very prosecutor who wants to come in and testify undertook. The judge found that they did so wrongfully and now they want him to come and testify. That is the reason that we attached these documents and so we're not trying to have it both ways. We can't effectively defend something that we don't know, that's not in our hands. This is a death penalty case as we all know. They want to kill our guy.

THE COURT: Okay. Counsel, obviously since the Utah Supreme Court

declined the State's request to unseal the records we are clearly bound by the Zana v. State case here in Nevada. With that being said, the Court does agree with the State's position that there is case law that says the State can make an offer of proof at the time of the Petrocelli Hearing and that is exactly what they're trying to do at today's hearing.

I am going to allow Mr. McGuire to testify, I mean, obviously if this was the time of trial my decision may be very different because of the language in Zana but here again the State is simply making an offer of proof and the Court's going to make a decision from it's offer of proof whether it's met its burden for prior bad acts under the Petrocelli standard.

Again, I think State and defense counsel are aware that if the Court grants the State's request for prior bad acts they are going to have to bring the actual witnesses, they're going to be severely limited because they're not going to be able to reference the court proceedings but I'm going to allow them to use Mr. McGuire today to tell me what witnesses they would call and are available at the time of trial, if I grant their request.

The other issue that you brought up is Mr. Stanton is not here due to some personal reasons. There is one witness that the State wants the Court to hear from and Mr. Stanton was responsible for that witness. I know that you flew into town for this hearing, counsel. Is there any way -- did you get a hold of Mr. Stanton that he could be here Monday for maybe an hour?

MR. DASKAS: Judge, I sent him a text, but I will tell the Court even if he's not available I will be prepared --

THE COURT: By Monday.

MR. DASKAS: -- to handle that witness. My only concern is insuring we can

get the witness here from Utah on Monday. I don't think that's going to be a problem either but I would -- I made one phone call to my secretary, I just haven't heard back yet. As soon as I confirm that then we can set it on Monday if that's amenable to the defense.

THE COURT: Mr. Galanter, I don't know what your trial schedules like. If we could do it Monday can you stay until Monday?

MR. GALANTER: I could but I prefer not to. I mean, if we could reschedule it for two weeks that'd be much better however if the Court wishes --

THE COURT: I think the State's probably fine with two weeks and I'm fine with that. I was just trying to accommodate your schedule.

MR. GALANTER: I still think we need to get through this witness because I just have one point of inquiry because I'm going to be cross-examining the witness. Is your ruling because we're not doing and offer of proof and we're doing a live testimony, are you gonna let this witness testify as to matters that are in the expunged record?

THE COURT: I don't think that's how the State's offering. I think the State is, and correct me if I'm wrong, you're going to offer him as a person who has knowledge of the witnesses who would be available to testify at the time of trial because certainly his record -- I mean, he wouldn't be qualified to testify to that himself at the time of trial. Is that correct?

MR. DASKAS: You're exactly right, Judge. We're not going to ask him to testify about records that had been sealed. I was gonna ask him questions about the Utah investigation, the trial itself and the witnesses who had testified, and primarily to illustrate for this Court the similarities between the Utah case and the Nevada case which is one of the arguments that the State believes this case is

admissible because of the similar modus operandi and for a number of other reasons. But to the extent Mr. Galanter is concerned that we're gonna utilize this witness to talk about records that were sealed and expunged, we are not going to do that. We are not going to do that.

MR. GALANTER: Well, I have a second concern and I appreciate Mr. Daskas' representation to the Court, you know, the case law is very clear. This witness would have to have independent recollection outside of what's in that sealed record. In other words, if he reviewed the record prior to coming in here to testify today or reviewed the record for the proceedings in Utah his testimony should not be allowed if it's based on that record. Now if he comes in and he swears under oath and he says, listen Judge, twenty years ago I did X, Y, and Z and I independently remember that that's what the law permits. But if he's gonna rely on the record, or in other words just, you know, get around that expungement order by saying, listen, I've reviewed it, here's the list of witnesses, this is the evidence and this is what I used to refresh my recollection clearly the case law says that's improper.

So the one safety valve or the one escape valve that the State of Nevada has is if it's truly independent then I would ask the Court to let me voir dire the witness before we get started in that regard.

THE COURT: All right, any response, Mr. Daskas?

MR. DASKAS: Judge, I can tell the Court based on what Mr. McGuire told me this morning he reviewed -- the only records he reviewed about the case pertain to the defense's motion and again, I don't mean these two gentlemen but the defense motion collectively to keep those records sealed and expunged, that's what he reviewed. That just happened so that had nothing to do with the sealing order itself. He has independent knowledge because he was the original prosecutor on the case

and I know he looked at some newspaper articles to refresh his recollection about some things but that's not a violation of any sealing order or expungement order. His knowledge for the most part, it's my understanding, is independent based on his investigation some twenty years ago.

THE COURT: Okay.

MR. GALANTER: I think we need to see it, I mean, I think that --

THE COURT: I'll allow some voir dire.

MR. GALANTER: Thank you.

THE COURT: But if he testifies the way the State indicates he will I'm not adverse to that.

MR. DASKAS: Yes, Your Honor.

THE COURT: All right, anything else? Do you want to try to get a hold of your secretary or are you ready to begin the hearing right now?

MR. DASKAS: Judge, we can, with the Court's permission, begin the hearing and then as soon as we're finished with the witness I can make those phone calls, if that's okay.

THE COURT: That's fine.

MR. GALANTER: Judge, let me -- could I just have --

THE COURT: Do you want a couple of minutes?

MR. GALANTER: No, I just want to give the Court a possible date.

[Off the record discussion between counsel.]

MR. GALANTER: Judge, it it's acceptable to the Court, Mr. Daskas and I have selected August 16th to continue the hearing, which is a Monday.

THE COURT: It would have to be in the afternoon.

MR. GALANTER: That's fine.

MR. DASKAS: That's fine Judge, and again, I can't imagine it wouldn't take more than probably 30 minutes or an hour at the most so we don't need a lot of time.

MR. BRYSON: And with that, Your Honor, I would have to give permission because I'm gonna be in a month long trial before Judge Mosley on a case starting August 9th.

THE COURT: I'm sure Judge Mosley would work with us.

MR. BRYSON: I would hope so but I just wanted to let the Court know that, that's all.

THE COURT: I can't do it before one because I have criminal calendar in the morning.

MR. BRYSON: That actually might work out because I think we're gonna do a half day in Judge Mosley and if that's the case then it might work out just fine.

THE COURT: Okay, that's fine. Well, we can speak to Judge Mosley after we do this hearing.

MR. GALANTER: Judge and, again, if you request or even order that I stay until Monday I can do that, it's just I was planning on flying out Sunday afternoon and have other things scheduled for Monday.

THE COURT: Frankly I'm here Monday or I'm here the 16th, it doesn't matter. I think the State would prefer to wait until the 16th.

MR. DASKAS: That would be great, Judge, and I appreciate that.

THE COURT: So Mr. Stanton can do it.

MR. DASKAS: Thank you, Judge.

THE COURT: Okay, are you ready to begin?

MR. DASKAS: Yes, Judge, Bill McGuire, please.

THE COURT: Mr. McGuire, come on up, sir.

WILLIAM McGUIRE

[having been called as a witness and being first duly sworn, testified as follows:]

THE CLERK: For the record will you clearly state your name.

THE WITNESS: William Kent McGuire.

THE COURT: Mr. Daskas.

MR. DASKAS: Thank you, Judge.

DIRECT EXAMINATION OF WILLIAM McGUIRE

BY MR. DASKAS:

Q Mr. McGuire, how are you employed?

A I am the chief deputy county attorney of Davis County, Utah.

Q What are your duties and responsibilities in that position?

A Right now I've moved over to the civil division as of November. I'm going to be the chief deputy over that division. I have been for probably ten years before that the chief deputy over the criminal division.

Q How many years in total have you been employed with that Davis County Prosecutors Office?

A Thirty years.

Q Do you also actually try cases?

A Up until November I tried a lot of cases.

Q I want to direct your attention back to 1986, specifically November 7th of 1986. Were you involved in the investigation of a homicide that ultimately resulted in charges being filed against Thomas Randolph?

A Yes, I was.

Q Incidentally, when is the last time you saw Thomas Randolph?

A He was up in Utah getting arraigned in this case shortly after he was, I think, arrested.

Q Do you see Mr. Randolph in Court today?

A I do.

Q Would you please point to him and describe something he's wearing as he sits in Court today.

MR. GALANTER: Judge, we'll stipulate to I.D.

MR. DASKAS: Thank you.

THE COURT: All right, thank you.

Q Mr. McGuire, tell me about how it is you first became involved in the homicide investigation that you're here to discuss.

A Detective Scott Conley of the Ogden Police Department --

MR. GALANTER: Judge --

THE COURT: Yes, sir?

MR. GALANTER: -- maybe this would be an appropriate time for me to voir dire the witness?

THE COURT: I'll allow voir dire at this time.

MR. GALANTER: Okay, thank you.

THE COURT: To determine the basis of his knowledge.

VOIR DIRE OF WILLIAM McGUIRE

BY MR. GALANTER

Q Mr. McGuire, good morning.

A Morning.

Q My name's Yale Galanter and I represent Mr. Randolph. You and I have never met, correct?

A We haven't.

Q Okay. So, just so I'm clear, this event that Mr. Randolph was ultimately charged with occurred in 1986, correct?

A That's correct.

Q What was your position in 1986?

A I was a deputy county attorney.

Q Okay. And in 1986 what were your responsibilities as a deputy county attorney?

A I was a felony prosecutor.

Q And did you have any field experience at that time?

A I don't know what you call field experience.

Q Well, when I was a felony prosecutor I worked in a building like this and pretty much stayed in that building from nine to five. Was it policy in Davis County for, what's the proper word, Assistant State Attorney or District Attorneys to go out into the field and do their own investigations?

A No, we would go out and help the police agencies. We wouldn't go out and do our own investigations we would sometimes be requested sometimes by the police agency to support them.

Q So like in a lot of jurisdictions if there was a homicide they may want an attorney, the district attorney or assistant state attorney to advise law enforcement on legal matters. Is that a fair statement?

A It goes beyond that in the State of Utah anything which is called an unattended death would be a matter which our office would be contacted and, depending on the circumstances, we may respond to the actual scene and advise the officers at that point.

Q But your role as an attorney at a homicide scene or whatever the requirements are in the State of Utah you're not there to investigate, you're there to assist law enforcement, is that correct?

A Correct.

Q In other words, if law enforcement may say to you do we need a warrant to go into the house or do we need a warrant to get this piece of evidence or do we have to Mirandize this particular witness you're there to give them legal advice as opposed to actually gather evidence, is that correct?

A For the most part, we sometimes suggest avenues that they might look into as part of their investigation.

Q But it's nothing you would do on your own?

A No.

Q In other words, whoever the investigators were in 1986 you would say to them, you may want to interview Mr. X or Mr. Y but you certainly wouldn't do those interviews yourself, correct?

A That's correct.

Q And as the prosecuting attorney in the case what you're doing is you are relying on what the investigators tell you or show you?

A For the most part.

Q Is that correct?

A The --

Q Well, let's talk about this case, in this case.

A Okay.

Q Did you do any independent investigation in the Randolph matter in 1986 yourself?

A In 1986, no, other than go to the scene of the death at that point.

Q So Judge Miley is clear, you did not interview any witnesses on your own?

A I did not.

Q You didn't gather any evidence on your own?

A I did not.

Q In other words, you didn't take a piece of evidence, put it in a bag, photograph it and tape it, correct?

A Of course not.

Q What you were primarily responsible for would be marshaling the evidence that the law enforcement investigators gathered, correct?

A To a degree we would look and observe what we might think might be appropriate evidence but certainly most of our duties were engaged in taking what evidence they provided to us.

Q So my question in terms of you're responsible for marshaling the evidence and ultimately you're responsible for putting together the legal theories by which you can prosecute the case and present it either to a judge or jury in Utah, is that correct?

A Yes.

Q And you really had no other involvement other than relying on what other investigators brought into your office.

A In 1986, that was true.

Q In 1986, other than maybe telling them they needed a warrant or who they should interview or what forensic tests they should complete, correct?

A Correct.

Q So, all the witness statements came in the form of reports that ultimately you would review, correct?

A Well, in the first instance when the case was looked at it was deemed by the officers to be a suicide so we really wouldn't review anything for criminal filing.

Q All right, Mr. McGuire, just so we're clear, at some point there was a decision made to prosecute Mr. Randolph for murder, is that correct?

A Yes.

Q And ultimately, as we know, he was acquitted of those charges.

A He was.

Q Okay. Now in you being the prosecutor on that case what you did is you would review witness statements that the police brought to you, correct?

A In part.

Q You would review the forensic evidence that the police brought to you, correct?

A In part.

Q And you would come up with your own prosecutorial theory on how to prosecute Mr. Randolph based on what the police brought to you?

A Yes.

Q So you have no independent basis other than what the police brought to you or brought to your office or whether or not -- and the theory you used to charge Mr. Randolph, is that correct?

A I don't know what you mean about independent matters.

Q Well independent means you didn't gather any evidence on your own, correct?

A Well, when you say evidence we did -- I did go out and talk to Mr. Tarantino prior to the filing of charges.

Q We're gonna get to that in a second but you didn't actually pick up any blood evidence, any guns, any cartridges, bullet fragments, anything like that, correct?

A No.

Q You didn't go out into the field and interview witnesses prior to the police doing it, correct?

A I did it along with the police.

Q Okay. So at some point, I gather from your testimony, when you were trying to make the decision on whether to prosecute the case as a homicide then you would call people into your office or have the police bring them in and interview them?

A No, actually we -- I went out with officers when we first talked to Mr. Tarantino back in New Hampshire.

Q Were there any other witnesses other than Mr. Tarantino?

A That I personally talked to?

Q You personally spoke to.

A No, he was the only witness that I personally spoke to during the investigative stage.

Q Okay, so let's hold Mr. Tarantino to the side for a second. Am I correct in stating that all of the other information you have about this case would have been through information that law enforcement brought to you either in the form of sworn statements or in the form of forensic evidence?

A Other than being at the scene itself, viewing the scene, also talking with

witnesses in preparation for the trial and discussing their testimony and circumstances with them.

Q Now, the witnesses that you spoke to during the trial prep phase were those witnesses that had already given prior sworn statements?

A Not sworn statements, no.

Q But they had given statements to the police?

A Certainly.

Q Okay. And I take it in Utah there's some procedure whereby law enforcement officer would memorialize what somebody's telling them orally, is that correct?

A There isn't a set procedure. Each individual detective, each agency may have a different method of doing that. Some record, some don't record. Some just take notes and then put it into a report, if you will.

Q But at the very least an officer would take notes and memorialize it in some type of a narrative report, is that correct?

A Certainly.

Q And that narrative report became part of your official file, correct?

A It did.

Q And part of that official file was one of the things that the Utah courts expunged, is that correct?

A Yes.

Q So all of those witness statements, the forensic evidence, that is all part of what now currently an expunged file?

A It is.

Q Okay. Now, did you review any part of that file prior to today's hearing?

A No, it's been sealed.

Q So, just so we're clear, at no time have you reviewed any part of that file?

A I have not reviewed any part of that file.

Q Certainly some of the things that you've been asked to testify about are contained in that expunged file, is that correct?

A I would assume there is information relative to the things that I remember and recall in that file, yes.

Q I'm going to give you an example, Mr. Tarantino's statement, his sworn statement would be part of that expunged filed, correct?

A I don't know if he took a sworn statement but any statements he made that were memorialized by officers would have been part of that.

Q And all of the other witnesses that you would have spoken to during your trial prep phase whether it be by narrative report or law enforcement officer note they would all be part of that expunged file also, correct?

A There were probably reports on each of, I won't say every witness because there were witnesses like Dr. Sweeney who the police didn't talk to. There was also therapist, Ms. Layton, which I believe the police did not talk to, that was our office going out and getting that information.

Q But am I correct in stating that your memory of those witness statements would be part of things that are contained in the expunged file?

A My memory is separate and apart from those items. Certainly those items at the time included things that I remember now.

Q Okay, well let's talk about that for a second. You didn't interview the witnesses independently at first, correct?

A I did -- other than Mr. Tarantino, that's correct.

Q Other than Mr. Tarantino, because you've already testified to that?

A Other than him, Dr. Sweeney, Ms. Layton, I'm not sure of any others. I'd have to look at the witness list and I don't have that.

Q But just so Judge Miley's clear, I mean you were not the individual that interviewed these witnesses, correct?

A The other witnesses, that's true.

Q The other witnesses. Okay. And your basis of what those other witnesses would testify to is part of some official police report.

A That's only part of it. Our individual, if you will, preparation for a case involves sitting down with that individual, talking with that individual, getting from them what they would testify to. It may have been part of that record, it may not have been part of that record because our preparation often goes to areas that the police officers don't even know about or didn't even think about.

Q Your -- you've been a Utah prosecutor for about thirty years, is that correct?

A That's correct.

Q You're certainly familiar with expungement statute?

A I am.

Q You're familiar with the portion of the expungement statute that says, no official shall ever testify as to matters that are contained in an expunged record?

A No I'm not.

Q You're not?

A No.

Q If I showed you that could it refresh your recollection?

A Certainly.

MR. GALANTER: May I approach, Your Honor?

THE COURT: Yes.

Q I gonna -- Mr. McGuire, I'm gonna show you 777-18-14, order to expunge distribution of order, and ask you to look at number 5 and ask you if that is an accurate presentation of Utah law and whether or not you're familiar with number 5.

A I'm familiar with that, yes.

Q Okay, and can you read number 5 for us?

A Goes no state, county or local entity, agency or official may after receiving service of an expungement order divulge information contained in the expunged portion of the record.

Q Okay and you would be one of those officials in number five, correct?

A Certainly.

Q Thanks, may I retrieve that?

So, as you sit here today can you tell us which pieces of information you have an independent, first hand recollection of that are not contained in the expunged file of Mr. Randolph?

A The only thing I can tell you is that in order for me to prepare for this hearing I went back and read all of the newspaper articles which led me to remember certain facts about it so they were in the public domain. Those were the only materials I had available to me to help refresh my recollection in certain areas.

Q And how did you get those newspaper articles, Mr. McGuire?

A I went to the archives the of Deseret News, typed in Tom Randolph -- Thomas Randolph and it came up with a list of articles about that and those are the

articles I used.

Q Okay. So just we're clear, your testimony today is gonna be based on what some reporter put in a newspaper article 20 years ago.

A No.

MR. DASKAS: Judge, object to that, mischaracterizes his testimony. What he said is he refreshed his memory which led him to recall the events independently, so that's a mischaracterization.

THE COURT: I agree. It does misstate his testimony. Anything else counsel?

MR. GALANTER: No, I --

Q And prior to your testimony here today did you ever confer with any of your law enforcement officials in the case, any of the detectives or sworn law enforcement officers?

A No, the only person I really talked to formally was Mr. Melvin Wilson who was the county attorney and my co-counsel on that case.

Q And what did you speak to him about?

A I spoke to him basically about the questions that arose from the 402 motion, which was a reduction to a lesser degree of offense and what his recollection was as to the circumstances behind that.

Q And are you telling us that you have independent recollection of what is contained in the expunged record? Is that your testimony?

A Portions of it, certainly. There are portions I couldn't tell you because I'm sure they're voluminous but I have certain portions that, yes, I do have an independent recollection.

Q And can you briefly tell us what they are?

MR. DASKAS: Well, Judge I --

MR. GALANTER: You've already told us --

THE COURT: Hold on a second.

MR. GALANTER: -- that you --

THE COURT: Mr. Galanter, hold on a second, the State had an objection.

MR. GALANTER: I'm sorry.

MR. DASKAS: I think the question that is vague and ambiguous is Mr. Galanter asking the witness to describe for this Court every single thing he knows about the case or is he asking something else? So I think it's a vague and ambiguous question, I would object.

MR. GALANTER: What I'm actually trying to get from the witness is because he has already stated that the items contained in the expunged files are voluminous and that he did very little first hand investigation, if any, on his own which parts he has an independent recollection of or which parts he is relying on what's in the sealed record.

MR. DASKAS: Judge --

MR. GALANTER: To give you an example if I may, Judge.

THE COURT: Clarify, please.

Q You have already told us that you independently interviewed Mr. Tarantino.

A I did, with the officer.

Q With the officer. And you have an independent recollection of the questions and answers that were given 20 years ago.

A Not all of them, no.

Q So you have partial recollection?

A Right.

Q And in terms of reciting what Mr. Tarantino told you did you review any part of the official record or statements for preparation today?

A It's sealed.

Q Were there any other witnesses that you have independent recollection of other than Mr. Tarantino?

A Dr. Sweeney. I recollect some of the statements of Ms. Saylor, who was Eric Tarantino's ex-wife. And another witness who was, I can't remember her relationship to the victim but it was Delia, I believe her name was, Alt.

Q But you don't remember her full name?

A I don't.

Q Okay. And of the four witnesses you've testified you only remember bits and pieces of what they told you 20 years ago, is that a fair statement?

A I think it's fair to say that I can only remember certain things, yes.

MR. GALANTER: I have nothing further, Your Honor.

THE COURT: Okay, anything else Mr. Daskas?

MR. DASKAS: No, Judge, I'm assuming I'm allowed to proceed with my questioning based on --

THE COURT: I'm going to allow Mr. McGuire to testify. Again, the State is making an offer of proof and whether his testimony is sufficient for the State to withstand -- to sustain his burden, I'll make that decision after the hearing.

MR. DASKAS: Thank you, Your Honor.

DIRECT EXAMINATION OF WILLIAM McGUIRE CONTINUES

BY MR. DASKAS:

Q Mr. McGuire, I believe you left off with mentioning that you went to the

scene or you were contacted by a Detective Scott Conley?

A Actually when I went to the scene that was prior to being talked to by Officer Conley, Detective Conley. I went to the scene because we were called out to an unattended death so myself and Mr. Major from our office went to the scene and did basically a walk through, talked to the officers who were there and observed what we were able to see at that point.

Q Would that have been on November 7, 1986?

A It would have been.

Q And when you say the scene, describe what was at that location if you would please.

A Well the thing that I recall about the scene was actually the bedroom area where she was lying.

Q And I apologize, let me stop you. What was actually -- was it a residence?

A It was a residence.

Q And what was -- describe the residence itself.

A And I can't tell you much about the residence because my memory is fixed upon the bedroom where everything was.

Q Let me ask you this, the residence, was it a single family home, a trailer, an apartment, what do you recall about that?

A As I recall a single family dwelling.

Q You actually went inside the home?

A I did.

Q And you mention a bedroom?

A Yes.

Q Was it a master bedroom?

A Appeared to be a master bedroom.

Q And tell me what you observed with your own two eyes inside that bedroom, please.

A We saw Becky Randolph's body laying in the bed with some covers on her. There was a gun in her right hand. Her chin I believe, I'm trying to remember which way it was, but it was tilted to one side. There was an entry wound on the right side of her head, an exit wound on the left side, some blood present but not a lot. And it was -- she was lying in a water bed that was cold at the time.

Q Are you aware ultimately of what caused her death?

A A single gunshot wound to the head.

Q And you mentioned the entry wound, based on your observations, were to the right side of the head?

A That's correct.

Q And you saw?

A I did.

Q Are you aware of the caliber of gun that was used to shoot Becky Randolph in the head?

A I don't remember the caliber of gun.

Q Are you aware of who contacted the police to report the discovery of Becky Randolph's body?

A Tom Randolph did.

Q And you mentioned the single family residence, are you aware of who lived in that residence at the time of Becky Randolph's death?

A It was my understanding that Mr. Randolph and his wife lived there. I

don't know if his son lived with them there but he did have a son at that time.

Q And when you say Mr. Randolph you're referring to the Defendant, Thomas Randolph?

A Correct.

Q All right. And when I asked you who contacted the police you said Thomas Randolph?

A That's my recollection. I know he was with his father at the time and the two of them went to the father's residence and called the police from that residence. And my recollection is it was him although it could be his father.

Q Understood. Regardless of who actually contacted or called the police, are you are aware of who actually discovered Becky Randolph's body?

A Yes, Thomas Randolph.

Q The Defendant?

A Yes.

Q Now a moment ago during some voir dire questions from Mr. Galanter you mentioned that you interviewed witnesses in preparation for trial.

A I did.

Q So separate and apart from whatever witness statements you may have been given by law enforcement you actually sat down and interviewed witnesses yourself.

A Each and every witness we put on the stand.

Q Okay. Based on your personal knowledge and these interviews that you conducted, did you learn that the Defendant, Mr. Randolph, had life insurance policies on the life of Becky Randolph?

A Yes, we did.

Q What is your recollection of the number of policies the Defendant had on her life?

A I believe it was six, it could have been five but I believe it was six.

Q Did you call witnesses during the trial in Utah of Mr. Randolph from those insurance companies?

A I don't believe we did in reality call those witnesses. My recollection is that that didn't become an issue in the trial.

Q At some point, based on your witness interviews and your gathering of information, did you obtain those life insurance polices?

A We did obtain those life insurance policies, copies of them anyway.

Q And what is your recollection of the amount of money in life insurance the Defendant had on Becky Randolph's life?

A My recollection was that it was approximately $250,000.00.

Q You mentioned during voir dire that you interviewed a witness named Eric Tarantino?

A That's correct.

Q And you mentioned New Hampshire?

A Yes.

Q Would you please tell me how that came about?

A Yes, that's where officer Scott Conley -- Detective Conley with the Ogden Police Department had met with an individual, my recollection is that it was Ms. Sylor or Saylor, Mr. Tarantino's ex-wife, and she had informed him that she had had communications with Mr. Tarantino where he had had discussions with her about entering into an agreement with the Defendant relative to killing his wife.

Q So, Mr. McGuire, am I correct that Mr. Tarantino didn't come forward to

law enforcement, law enforcement tracked him down?

A That's correct in fact we were told by his ex-wife that if he knew about it he would run because he was scared.

Q He wasn't cooperative, in other words, initially?

A No, we didn't tell him we were coming. We flew out there, we went to his residence hoping to catch him and when we were able to catch him then he was naturally surprised that we were there.

Q And this was in New Hampshire?

A It was.

Q Was this in some time in 1987?

A Would have probably been in 1988 or thereabouts.

Q Did you have personal conversations and interviews with Eric Tarantino?

A Yes, I did.

Q Both in New Hampshire and later on in Utah in preparation for trial?

A Yes.

Q What information did you learn from Eric Tarantino that was pertinent to the death of Becky Randolph?

A He and the Defendant had a friendship relationship and during this kind of relationship that they had and developed the Defendant approached him about taking care of somebody that was a problem to him. Ultimately he found out that it was Mr. Randolph's wife, Becky, and they discussed various ways, several ways of killing her, making it look like an accident or something that certainly wasn't a homicide except under circumstances there was, I guess, a burglary situation which I could be called that way.

Q Let me stop you just for a moment. You said according to Eric Tarantino, they discussed various ways of killing Becky Randolph?

A That's correct.

Q Who did you mean by they when you say they discussed?

A Mr. Randolph and Eric Tarantino.

Q So the Defendant and Eric Tarantino had these conversations?

A Yes.

Q And based on your interview of Eric Tarantino who's idea was it to have Becky Randolph killed?

A It was the Defendant.

Q Thomas Randolph?

A Yes.

Q You mentioned one of the matters in which the Defendant discussed with Eric Tarantino killing Becky Randolph, his wife, was a staged burglary?

A Yes.

Q What do you recall about that beyond what you've described so far?

A He didn't go into detail about that he just -- he kind of went through a whole series of possible scenarios that they had talked about and he said one of them would have been a burglary where he would have been in the house and surprised by her, apparently, then shot.

Q And when you he would have been in the house do you mean the Defendant or do you mean Eric Tarantino?

A No, Eric Tarantino.

Q And there would have been a gun involved in that situation according to Eric Tarantino?

A Yes.

Q And again, based on what Eric Tarantino told you, it would have involved shooting the Defendant's wife, Becky Randolph?

A That's my recollection, yes.

Q During a staged burglary?

A Mmhmm.

Q Was that yes?

A Yes.

Q All right. Incidentally, are you aware that Eric Tarantino is still alive and well?

A I haven't spoken with him since 1989 so I was not.

Q That was the last of your involvement?

A Mmhmm.

Q Is that correct?

A Yes.

Q Okay.

A Sorry.

Q That's okay. Did Eric Tarantino explain to you what benefit he, Eric, would receive as a result of killing the Defendant's wife?

A The Defendant told Eric that he would pay him $10,000.00 from the proceeds of the insurance policies.

Q Eric Tarantino testified at trial?

A He did.

Q And without getting into all of his testimony, did it include what you just describe the manner of killing Becky Randolph?

A I think we went through the serious of different ways that it could have happened. It wasn't related specifically to one area.

Q Correct, in other words, according to Eric Tarantino, did the Defendant suggest to Eric Tarantino other ways of killing Becky Randolph?

A He did.

Q It wasn't limited to the staged burglary?

A No, there were probably six or seven different ways that they discussed.

Q You mentioned, I believe, three other names a moment ago during some voir dire questions by Mr. Galanter of other witnesses. Tell me what other witnesses testified at the trial of Thomas Randolph involving the death of Becky Randolph.

MR. GALANTER: Judge, I have to object.

THE COURT: What's the objection, counsel?

MR. GALANTER: The objection is we're not allowed to discuss what occurred at the trial but we are -- this witness is being called for the limited purpose of what his independent recollection is. The trial record and transcripts are all sealed. What happened at trial according to Utah law and Nevada law never occurred.

MR. DASKAS: Judge, one of the inquiries this Court made was what witnesses would be available to testify at the upcoming trial --

THE COURT: Correct.

MR. DASKAS: -- should this Court admit the other bad act evidence. However, based on that objection I will move on. I've represented to this Court that Eric Tarantino is available as a witness so we'll handle that during argument after

this witness testifies.

THE COURT: All right, thank you.

MR. DASKAS: Thank you, Your Honor.

Q I want to talk to you now about another aspect of Thomas Randolph's criminal background in Utah. After the death of Becky Randolph, was there an investigation involving a murder for hire plot?

A Actually that occurred during the -- prior to the trial. We came upon that during the course of preparation for our case. The incident actually occurred during that interim time period.

Q Am I correct the incident occurred while Mr. Randolph was in jail awaiting trial for the death of Becky Randolph?

A It did.

Q Now this, what I'm calling the murder for hire plot, were you involved in that investigation?

A I was involved in the investigation portion. I met with the undercover officer we utilized. We planned out how to approach it. I was aware and listened to various tapes at the time that were recorded conversations. To that extent I was part of it. I did not prosecute that case.

Q Understood. So I want to ask you some questions and my questions are only designed to illicit information that you have based on your involvement in the investigation and witness interviews.

Did somebody come forward from the jail where the Defendant was housed and describe this murder for hire plot?

A He did. It was a cellmate who came and talked to --

MR. GALANTER: Judge, I --

THE COURT: Yes, sir?

MR. GALANTER: Again, I hate to interrupt the witness but I have to object. What you're about to testify to Mr. McGuire is all part of another sealed and expunged record, is that correct?

THE COURT: What's your objection, counsel, first of all?

MR. GALANTER: My objection is --

THE COURT: Why don't you next time wait for a ruling from the Court, please.

MR. GALANTER: Oh, I'm sorry.

THE COURT: Before addressing the witness.

MR. GALANTER: I'm sorry, Judge.

THE COURT: Thank you. What's your objection, counsel?

MR. GALANTER: My objection is I believe the witness is about to testify and go into matters that are, again, part of another sealed and or expunged record, and I'd like an opportunity to voir dire the witness based on that, and try and decipher --

THE COURT: The request is denied at this time, but I'm going to ask that the State please lay a foundation.

MR. DASKAS: Yes, Judge.

THE COURT: All right, thank you.

Q Mr. McGuire, again, my questions along the lines of the murder for hire plot are similar to those about the death of Becky Randolph and they're limited to the information you have based on your witness interviews, independent knowledge and investigation as opposed to anything that was sealed and expunged. You appreciate those parameters?

A I do.

Q Okay. If I ask you a question and it calls for you to testify about information you know based on a sealed or expunged record will you tell me so that you don't answer the question?

A Yes.

MR. DASKAS: Is that sufficient, Your Honor?

THE COURT: Yes.

MR. GALANTER: Well --

MR. DASKAS: Thank you, Judge.

MR. GALANTER: Judge, may we --

THE COURT: What's the objection?

MR. GALANTER: My objection is that's a very fuzzy line and I don't know where to draw it and I'd like to get some indication before the question as to what his independent recollection is. See, because we have no way of knowing whether he's relying on something that is part of the sealed record or not. As in the other case we knew that he independently spoke to four witnesses. I'd like to get that same information before he goes any further.

MR. DASKAS: I will ask the specific questions, Your Honor, with the Court's permission?

THE COURT: Yes, and counsel, do you understand what Mr. Daskas just asked you?

THE WITNESS: Yes.

THE COURT: Do you understand the limits of what you can testify?

THE WITNESS: Yes.

THE COURT: All right. Please continue, Mr. Daskas.

MR. DASKAS: Thank you.

Q Who was the person Thomas Randolph wanted killed while he sat in jail awaiting trial?

A Eric Tarantino.

Q The witness in the Becky Randolph murder prosecution?

A Yes.

Q And what steps were taken by the Defendant, what information did you learn toward that end, toward having Eric Tarantino killed?

A Well, the plan was for him to pay a certain amount of money --

THE COURT: Him, being Mr. Randolph?

THE WITNESS: Mr. Randolph, thank you, Your Honor, to pay Mr. McCarthy a certain amount of money to whack, as the term was used, Eric Tarantino.

Q Who used the term, whack?

A It was Mr. Randolph.

Q Did he use that term during one of these phone calls that was monitored?

A Yes, he did.

Q And so what he, the Defendant, was going to pay money to a hit man to have Eric Tarantino whacked or killed?

A That was our belief, of course they tried to show it was something other than that but that was our belief.

Q Was money ever exchanged?

A A car title was exchanged. Mr. Randolph's girlfriend, Ms. Moore, delivered that car title to Mr. McCarthy and after that occurred, naturally, an arrest was made and charges were filed.

Q When you say an arrest was made, was the Defendant, Thomas

Randolph, arrested and charged with that murder for hire plot?

A He was charged. He was already in jail.

Q And I appreciate that clarification. Do you know what the charge was?

A Conspiracy to commit murder.

Q Did that case proceed to trial?

A No it did not.

Q Was a plea entered?

A Yes, it was.

Q Do you know the crimes in which the Defendant pled guilty?

A He pled guilty to tampering with the witness.

Q The basis of that plea was the murder for hire plot that you described?

A Yes.

MR. DASKAS: Judge, may I approach your clerk, please?

THE COURT: Yes, sir.

MR. DASKAS: Thank you.

[Conversation between Mr. Daskas and Clerk indiscernible.]

Judge, can I approach the witness, please?

THE COURT: Yes. Please show the defense.

MR. DASKAS: And, Your Honor, I'm showing the defense Proposed Exhibits 1 and 2, which are copies of exhibits the Defense attached to their opposition to our motion for other bad acts.

And, Your Honor, let me just say for the record if I could please, and I'm not trying to be cute with the Court or defense counsel, but clearly the defense is concerned about a witness testifying to or me referring to documents that were part of the sealing and expungement order. These are two exhibits that were attached to

now is are you going to withdraw those documents? If the answer is yes I understand the State's not going to request -- I mean, not going to pursue discussing it with the witness. If you're not then I am going to allow questioning along the line indicated by the State.

[Indiscernible discussion between defense counsel.]

MR. BRYSON: All right, we'll withdraw those exhibits.

THE COURT: All right.

MR. DASKAS: May return these to your clerk?

THE COURT: Please.

MR. DASKAS: They should be proposed Exhibit 1 and 2.

MR. BRYSON: And the reason for that was given the Utah court's rulings.

THE COURT: All right, that's fine, thank you.

Q Mr. McGuire, let me ask what is, I'm sure, and obvious question but the case we were just discussing you mentioned the Defendant walked into court and pled guilty?

A He did.

Q In other words, just like Nevada or any other case he acknowledges that the case was established beyond reasonable doubt?

A That's correct.

Q Back to the murder of Becky Randolph. The information you mentioned that you described, the factual information involving the plot to have Becky killed for life insurance policies, the amounts paid and the payment to Eric Tarantino, all of that information came from Eric Tarantino, was that correct?

A Yes it did come from Eric.

MR. DASKAS: I'll pass the witness, Your Honor.

THE COURT: Counsel?

CROSS-EXAMINATION OF WILLIAM McGUIRE

BY MR. GALANTER:

Q Yes, just a few more questions, Mr. McGuire. How long did you work on prosecuting Mr. Randolph's case from beginning to jury verdict?

A It would have probably been about six months, I would guess.

Q Okay, and during that six month period as you've testified, you looked at all the witness statements, correct?

A Yes.

Q You looked at all the forensic evidence, correct?

A Of course.

Q Put your case together and you actually prosecuted it before a jury in the State of Utah, correct?

Q And that jury acquitted Mr. Randolph, correct?

A They did.

Q And would it be fair to say that your case, primarily, relied on Mr. Tarantino's testimony?

A There was a large part of our case that relied on his. Clearly there was other evidence to support his testimony.

Q Right, that was your viewpoint. Your viewpoint was that the large part of the case was based on Mr. Tarantino's evidence. Your viewpoint was that the forensic supported what he was telling you, correct?

A Yes, as well as other factors that evolved in the case.

Q Right and the jury rejected all of your theories by acquitting Mr. Randolph, is that correct?

A They found that we did not prove beyond a reasonable doubt.

Q They rejected your theories and acquitted Mr. Randolph of the murder charge?

A You can ask it that way. In talking with them we did not prove it beyond a reasonable doubt.

Q Obviously, you're the prosecutor, you have one viewpoint on what occurred, correct?

A I do.

Q I'm the defense lawyer, I have a completely different viewpoint on what occurred, correct?

A Usually that's the case.

Q But what there's no disagreement on is that the jury said no to you by acquitting Mr. Randolph.

A They told us that we did not prove it beyond a reasonable doubt.

Q Now in terms of the murder for hire case, I know Mr. Daskas asked you at the end of his questioning whether or not Mr. Randolph went into court and pled guilty, do you recall that a few minutes ago?

A Yes.

Q Were you present in court when that occurred?

A Yes.

Q Okay. Mr. Randolph did not pled guilty to the murder for hire crime, is that correct?

A That's correct.

Q He pled guilty to a misdemeanor crime.

A No he did not.

was an acquittal as far as --

MR. DASKAS: Okay, perfect Judge.

THE COURT: -- the charges regarding Becky Randolph.

MR. DASKAS: Thank you, Judge.

Q Mr. McGuire, finally Mr. Galanter asked you about this murder for hire case. Did the Defendant plead guilty to a misdemeanor charge or a felony charge?

A Felony.

Q And what was the label of that felony, what was it called?

A Tampering with the witness.

Q Regardless of the label, the facts to which the Defendant pled guilty to support that charge, were they the same facts you describe to me a moment ago involving Steve Williams and undercover Detective Bill McCarthy?

A They were.

Q The same facts where you mentioned that would-be victim in that case was Eric Tarantino?

A Yes.

MR. DASKAS: I have nothing else, Your Honor, thank you.

THE COURT: Anything else Mr. Bryson or Mr. Galanter, sir?

MR. GALANTER: Just a follow up on what Mr. Daskas said.

RECROSS EXAMINATION OF WILLIAM McGUIRE

BY MR. GALANTER:

Q In terms of the murder for hire charge, you went into the decision making process to reduce it to a lesser charge of tampering with the witness, correct?

A I was not involved in those negotiations.

MR. GALANTER: I have nothing further.

THE COURT: Is he free to go?

MR. DASKAS: Yes, ma'am, thank you.

THE COURT: Sir, thank you for your time, you're free to go.

THE WITNESS: Thank you.

THE COURT: Okay, so that's the only witness we're going to have today, correct?

MR. DASKAS: Yes, Your Honor.

THE COURT: Okay. I have some additional questions for the State. Obviously again as we talked about limited, if the Court grants your motion you're going to be limited because of the Zana Case.

MR. DASKAS: Without question, Judge.

THE COURT: Okay. And you've already indicated to me that if I allow your motion that you would intend to call Mr. Tarantino personally in to speak regarding his experiences.

MR. DASKAS: Yes, Your Honor.

THE COURT: And who else would the State intend to call?

MR. DASKAS: Judge, in our case in chief it would be limited to Eric Tarantino and perhaps Bill McGuire so long as he could provide independent, relative and useful information. Any other witnesses would really depend on what the defense does either on cross-examination or their case in chief to rebut the notion that there was actually a murder of Becky Randolph. So as of right now Judge -- and the reason I ask the last question, and I'm sure you'll appreciate why I did, which was along the lines of all of the information Mr. McGuire described came from Eric Tarantino, the witness said yes, that's precisely why I asked that question because

all of that information, the life insurance policies, the proceeds, the payment, the different manners in which Eric Tarantino was asked to kill Becky Randolph came from Eric Tarantino through Thomas Randolph. So I believe we can establish all of the pertinent things through Eric Tarantino.

The only other witness I would say, Judge, we would call would be somebody who was at the crime scene and that could be Bill McGuire or a detective who could explain the injury to Becky Randolph because in that case, like in this case, there's a single gunshot wound to the right side of the victim's head. In that case like in this case Becky Randolph is found in her residence that she shared with the Defendant, and so there's a number of things we want to elicit to establish the similarities. So it would either be Bill McGuire or another officer who could describe the scene and the victim's injuries.

MR. BRYSON: Your Honor, I would renew, again, my objection and I ask that this Court strike the testimony of Mr. McGuire except for what witnesses he said he got information from because, again, it's clear under Subsection 5 here that he should not even be speaking about this; no state, county or local entity, agency or official may after receiving service of an expungement order divulge information contained in the expunged portion of the record. The reason I'm renewing that at this point is because he could not articulate in response to Mr. Galanter's questioning, or quite frankly the Court's questioning, what testimony he was articulating was from his own personal knowledge and what testimony he was giving today that was based upon the record. I submit to you that they are completely intertwined and thus he should not be allowed to testify.

The person that we need to have here for purposes of this Petrocelli Hearing appears to me would be Mr. Tarantino. And without him here testifying so

we have an opportunity to find out if they can establish their burden by clear and convincing evidence, if he's allowed to testify at trial it's trial by ambush. We have absolutely no idea what Mr. Tarantino's gonna say without having opportunity to cross-examine. And once he takes that stand we cannot un-ring that bell. That's what the D.A.s are relying on here. They know that. They're experienced prosecutors. Doesn't matter what type of curative instruction you give this jury, once this jury hears that my client allegedly tried to get him to murder his wife Mr. Galanter and I can stand on our head here and do somersaults and fancy tricks and it's not gonna matter, it's done then. And I respectfully request that we don't need to hear an A.G., we don't need to hear Mr. McGuire, what we need to have and what they should bring here is the actual horse. Let's hear it from the horse's mouth, Tarantino, that's who should be here in two weeks.

THE COURT: Okay. And again the reason I allowed Mr. McGuire today is the Court is making an offer of proof. As far as the argument set forth by the defense those would go to the weight the Court gives Mr. McGuire's testimony in determining whether or not the State has met its burden to allow the prior bad acts. And again I don't think anyone disputes that under the Zana Case that Mr. McGuire certainly would not be sufficient at the time of trial to provide the information the State would like to provide rather that is going to have to come from the witnesses themselves and the State recognizes that will be their obligation to make sure those witnesses are actually here, if I do grant their motion.

With that being said, let's deal with when we're going to continue this hearing. I can talk to Judge Mosley. I doubt it's going to be a problem for me to have you for an hour and a half that day.

MR. BRYSON: That's fine. And I would respectfully request just because it's

when I'm in another judge's that you do so.

THE COURT: I will.

MR. BRYSON: And that you are formally ordering me to be here.

THE COURT: I will speak with Judge Mosley. He just happens to be on the same floor. I don't know if he's in his office today but I can check. So the 16th would work?

MR. GALANTER: Yes.

THE COURT: That would be your preference, Mr. Galanter? And what about for you, does that work for you as well?

MR. DASKAS: That's wonderful, Judge, and I appreciate that. And whether Mr. Stanton is here or not I will be prepared to handle that final witness, so either way we can do the hearing on the 16th.

THE COURT: Okay, well let's take a break and see if I can catch Judge Mosley and see if I can have you for a few hours on the 16th.

MR. BRYSON: State v. Gilbert.

THE COURT: State v. Gilbert. Okay, I will go speak with the Judge now.

MR. DASKAS: Thank you, Judge.

PROCEEDING CONCLUDED AT 9:42 A.M.

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case to the best of my ability.

Dalyne Easley

DALYNE EASLEY

Court Recorder/Transcriber

EXHIBIT "G"

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CASE NO. C250966
DEPT NO. XXIII

THOMAS WILLIAM RANDOLPH,
#273406

Defendant.

/

DECISION

This matter was last before the Court on July 30, 2010 and August 16, 2010, pursuant to the State's Motion to Admit Evidence of Prior Bad Acts and Defendant's Opposition thereto. At the time of the *Petrocelli* hearing, the State sought admission pursuant to NRS 48.045 of two prior acts allegedly involving the Defendant. For purposes of identification the prior bad acts sought to be introduced by the State shall be known as (1) the Utah Case and (2) the Murder for hire case.

At the time of the hearing, the State presented the testimony of William Kent McGuire, the Chief Deputy County Attorney in Davis, Utah. Mr. McGuire was the Chief Deputy of the Criminal Division in 1986, the year Defendant Randolph's former wife, Becky Gault Randolph, was found dead in her residence in Clearfield, Utah. The State offered Mr. McGuire's testimony as a proffer of the evidence it would present by way of live witness testimony at the time of trial. These witnesses would include the investigating detectives, police officers and

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DISTRICT JUDGE
PARTMENT TWENTY THREE
S VEGAS NV 89101-2408

witness, Eric Tarantino. According to the State, these witnesses would testify only according to their own experiences and recollections.

Mr. McGuire was directly involved in the investigation and resulting trial regarding Becky Randolph's death. Defendant Randolph was charged and tried in the death of Becky Randolph (i.e. the Utah Case). Following a jury trial, Defendant Randolph was acquitted for Becky Randolph's death. In the instant case, the State sought to introduce evidence of the investigation and death of Becky Randolph.

Additionally, the State sought to introduce evidence of the Defendant's guilty plea to witness tampering in 1989 (i.e. the Murder for Hire Case). Defendant was convicted of a third-degree felony for allegedly attempting to have witness, Eric Tarantino killed. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p.8). This charge allegedly stemmed from the Becky Randolph trial. This charged was ultimately reduced to a lesser charge and was sealed and expunged by the Utah Court.

Defendant objected to the State's proposed proffer for both the "Utah Case" and the "Murder for Hire" case prior bad acts. The objections were based upon Defendant's acquittal in the "Utah Case" and the sealing and expungement of the record in the "Murder for Hire" case. Defendant's objection was overruled by this Court. However, Defendant Randolph's acquittal for the death of Becky Randolph, the Utah Court's decision to seal and expunge the records and the Nevada Supreme Court's recent decision

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DISTRICT JUDGE
DEPARTMENT TWENTY THREE
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in *Zana v. State*, 216 P.3d 244 (2009), Mr. McGuire was limited in his testimony at the time of the Petrocelli hearing to his personal experiences and recollections.[1]

I. Factual Background

In the instant case, the State alleges on or about May 8, 2008 in Las Vegas, Nevada, Defendant Randolph and his wife, Sharon Cause Randolph, returned to their residence after having dinner. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p 3). Defendant Randolph stopped in the driveway to let his wife out of the vehicle. *Id.* at 4. Defendant Randolph stayed in the vehicle listening to music while his wife entered the residence. *Id.* When Defendant Randolph entered the residence a short while later, he found his wife lying face down at the end of the hallway *Id.* After seeing shadows at the end of the hallway, Defendant Randolph retrieved his 9mm semi-automatic handgun. *Id.*

Thereafter, the State alleges Randolph fired several shots at a masked intruder who then fell into the garage. *Id.* at 4–5. Additional shots were then fired by Defendant Randolph at the masked intruder. This "masked intruder" was determined to be Michael Miller, a friend of Defendant. *Id.* After the Defendant "cleared" the home, he called 911. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p.4). Located near

[1] It was also recognized by the State that at the time of trial, the witnesses would again be limited to their own personal experiences and recollections pursuant to *Zana*. In addition, this Court is well–aware that any proposed evidence at trial would be subject to the standards regarding limiting instructions set forth in *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001).

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Miller's body was a full–faced "ski" mask, containing no blood or bullet holes. *Id.* at 5; *see also* Grand Jury Transcript, Vol. 1 p. 21.

It is the State's position that Defendant Randolph solicited Michael Miller to kill Sharon Randolph in a staged burglary following which, he ambushed an unsuspecting Michael Miller as he walked into the garage with Randolph. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at 2). The State further alleges that the motive for these killings was over $400,000 in life insurance proceeds taken out on the life of Sharon Randolph. *Id.* at 5.

The State seeks admission of two alleged prior bad acts of Defendant Randolph (i.e. the Utah Case and the Murder for Hire Case) to show motive, intent, preparation, plan, knowledge and identity. *Id.* at 16.

II. Prior Incidents

A. Utah case

First, the State seeks admission of a prior case, which shall be known for purposes of identification only as ("the Utah Case"). The State alleged that in the 1980s, Defendant Randolph lived in Utah with his then wife, Becky Gault Randolph. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p.5).

Becky Randolph was Defendant Randolph's second wife. *Id.* They married in April 1983. *Id.* On November 7, 1986, Becky Randolph ("Becky") was found dead in her residence in Clearfield, Utah. *Id.* She had a gunshot wound to her right temple. *Id.* Becky Randolph was found dead by her husband, Defendant Randolph.

Id. at 6. An investigation ensued. *Id.* at 6–8. Mr. McGuire was part of this investigation. (*See* Hearing on State's Motion to Admit Evidence of Prior Bad Acts, Testimony of William Kent McGuire, Jul. 30, 2010). Defendant Randolph was charged and tried for the death of Becky Randolph. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p.8).

According to Mr. McGuire he personally interviewed witnesses in preparation for trial. (*See* Hearing on State's Motion to Admit Evidence of Prior Bad Acts, Testimony of William Kent McGuire, Jul. 30, 2010). These witnesses included Eric Tarantino. *Id.* According to Mr. McGuire, he was told by Mr. Tarantino that he was friendly with Defendant Randolph. *Id.*

As a result of this friendship, Defendant Randolph approached Tarantino about taking care of someone who was a problem to him. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at pp.6–8). This person turned out to be Becky Randolph. *Id.* During the investigation, Tarantino represented to McGuire that he and Defendant Randolph discussed several ways to kill Becky, one of which was a staged burglary. *Id.* at 7.

Tarantino indicated that in exchange for killing Becky, Defendant Randolph was going to pay him $10,000 from insurance proceeds. *Id.* Mr. McGuire indicated that according to his investigation, Defendant Randolph had taken out 5–6 life insurance policies on Becky totaling approximately $250,000. (*See* Hearing on State's Motion to Admit Evidence of Prior Bad Acts, Testimony of William Kent McGuire, Jul. 30, 2010).

B. Murder for Hire

Mr. McGuire also testified that during the Becky Randolph trial there was a "murder for hire" plot. (*See* Hearing on State's Motion to Admit Evidence of Prior Bad Acts, Testimony of William Kent McGuire, Jul. 30, 2010). McGuire was involved in the preliminary investigation of this case, but was not involved in the prosecution.

According to Mr. McGuire, Bill McCarthy, an undercover officer for Salt Lake County, came to the County Attorney's office and told him that Defendant Randolph had solicited his cellmate, Steven Williams, to have Eric Tarantino killed. (*See* Hearing on State's Motion to Admit Evidence of Prior Bad Acts, Testimony of William Kent McGuire, Jul. 30, 2010).

The title to Randolph's car was exchanged for the killing of Eric Tarantino. (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p.8). This exchange was done by Defendant Randolph's then girlfriend, Wendy Moore. *Id.* Defendant Randolph ultimately entered a plea to tampering with a witness. *Id.* Randolph was sentenced to up to five (5) years in prison for this crime. *Id.* This sentence was ultimately reduced to a lesser offense.

Defendant subsequently obtained an order sealing and expunging these records. (*See* Ruling of Judge Glen R. Dawson, In the Second Judicial District, Davis County, State of Utah, Bountiful Department, 0907-839, 0907-840, Received by State Attorney, July 21, 2010). On July 16, 2010, the Honorable Glen R. Dawson denied the State of Utah's Petition to open the Defendant's expunged records for the purposes of the instant Nevada case. *Id.*

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III. Discussion

Preliminarily, this Court takes into account that Defendant has acknowledged that "[t]he parties do not dispute the applicable law dealing with the admissibility of alleged bad acts." (*See* Defendant's Opposition to Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 16, 2009, at p. 3). However, before addressing the proposed acts, this Court must first determine the scope of potentially admissible evidence (as it pertains to the proposed prior acts of Defendant), which are sought to be admitted at trial by the State. This determination takes into account that there is a prosecutorial limitation as it relates to facts contained in the sealed and expunged Utah cases, however, this type of limitation was clarified by the Nevada Supreme Court in *Zana v. State*, -- Nev. --, 216 P.3d 244 (2009).

In *Zana*, the Nevada Supreme Court clearly stated that "Although statutes empower courts to seal a proceeding's records, individual memories of events outside the courtroom are beyond such judicial control." *Id.* at 247. The *Zana* Court further reasoned "It is clear, however, that such authorized disavowals cannot erase history. Nor can they force persons who are aware of an individual's criminal record to disregard independent facts known to them." *Id.* Additionally, the *Zana* Court recognized:

> Thus, as we have previously observed, while a sealing order erases many of the consequences that potentially flow from past criminal transgressions, it is beyond the power of any court to unring a bell. *See id.* For example, in *Baliotis*, the Las Vegas Metropolitan Police Department recommended denial of a convicted felon's application for a private detective's license based on his prior felonies even though records of the applicant's felony convictions were sealed. *Id.* at 569, 729 P.2d at 1339. This court upheld the recommendation

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> because the officers investigating the applicant's character had personal knowledge of the applicant's criminal history. *Id.* at 570–71, 729 P.2d at 1339–40. In so doing, we respected the sealing statute's limited effect: it erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others. *See id.* at 571, 729 P.2d at 1340.

Id.

Thus, *Zana* makes clear that it is permissible for witnesses to testify as to facts independently known to them, and not from records of the expunged court proceedings.

Notwithstanding *Zana*, the Nevada Legislature has prescribed 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 the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045(2).

Here, the State seeks to introduce two prior acts of Defendant Randolph (i.e. the Utah Case and the Murder for Hire Case) to show motive, intent, preparation, plan, knowledge and identity.

Recently, the Nevada Supreme Court reiterated: "[ ]o be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Fields v. State*, 220 P.3d 709, 713 (Nev. 2009) (citing *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064–65 (1997)).

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The *Fields* Court further stated that: "[i]n assessing 'unfair prejudice,' this court reviews the use to which the evidence was actually put-whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity." *Id.* (citing *Rosky v. State*, 121 Nev. 184, 197–98, 111 P.3d 690, 699 (2005)). Also key is "the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself." *Id.* (quoting *Ledbetter v. State*, 122 Nev. 252, 262 n. 16, 129 P.3d 671, 678–79 n.16 (2006). Furthermore, in regards to evidence related to identity the *Fields* Court stated:

> [E]vidence of prior criminal behavior may only be admitted to prove identity when its prejudicial effect is outweighed by the evidence's probative value and when that prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity is in question.

Id. at 714–15 (quoting *Canada v. State*, 104 Nev. 288, 291-93, 756 P.2d 552, 554 (1988).

For the reasons set forth herein, COURT FINDS as follows:

A. **The Utah Case and the Murder for Hire are Relevant to the Crime Charged, and Provide a Basis to Establish Motive, Intent, Preparation, Plan, Knowledge, and Identity. The Probative Value of the Prior Acts is not Substantially Outweighed by the Danger of Unfair Prejudice.**

COURT FINDS, the Utah case and murder for hire plot are relevant to the charged. Both acts are inextricably intertwined for the purposes of NRS 48.045. Irrespective of the fact that Defendant was acquitted of Becky's murder, the death of Becky Randolph cannot be erased from this proceeding. According to the State's argument at the *Petrocelli* hearing, it is not seeking to introduce the Utah case to show that Defendant actually murdered Becky Randolph.

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Similarly, the murder for hire plot is relevant to show knowledge, intent, preparation, plan, motive, and identity because in the instant case, Defendant admittedly knew (and was friends with) the man who allegedly shot his wife. Thus, the fact that Defendant wanted to have Tarantino killed (a man with whom Defendant spoke with regarding killing his wife in a staged burglary) in the Utah case is relevant to the crime charged.

Accordingly, the Utah Case and murder for hire plot may be referenced by the State, not to show propensity, but in order to present evidence in accordance with NRS 48.045, and to provide a coherent narrative with regard to the murder for hire plot. Without mention of independent facts surrounding Defendant's prior trial, the jury would be confused as to why Defendant would have the motivation to tamper with a witness.

First, the State argues that the prior acts may be utilized to prove motive. Utilizing prior acts to establish motive was addressed in *Ledbetter v. State*, 122 Nev. 252, 129 P.3d 671 (2006). "It therefore remains the law in Nevada that whatever might motivate one to commit a criminal act is legally admissible to prove motive under NRS 48.045(2), so long as the three-factor test for admissibility is satisfied." 122 Nev. at 262, 129 P.3d at 678 (internal quotation marks omitted). Here, that test is satisfied.

Here, the State has alleged that Defendant had a financial motive to have his wife killed. Utilizing the prior acts, the State presented testimony from Mr. McGuire that Defendant was the beneficiary of Becky Randolph's life insurance policy, and was found by the defendant, dead in the marital residence. Similarly

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here, the State has also alleged that Defendant was the recipient of over $400,000 in life insurance proceeds after Sharon Randolph was pronounced deceased. The proposed evidence is probative because it illustrates that Defendant had a financial motive to have Sharon Randolph killed. This evidence's probative value is not substantially outweighed by the danger of unfair prejudice

The State next alleges that the Utah case and the murder for hire plot proves Defendant's "actual intent was to have Sharon killed." (*See* State's Notice of Motion and Motion to Admit Evidence of Prior Bad Acts, Filed Nov. 4, 2009 at p.9). The murder for hire scenario is also extremely probative on the issue of intent as it relates to the death of Michael Miller in the instant case. The fact that Defendant solicited an undercover agent to have a witness (who was also his friend), killed during his previous murder trial, is probative as to whether Defendant intended to kill Miller, after Miller killed Sharon. *See, e.g., U.S. v. Queen*, 132 F.3d 991 (4th Cir. 1997) (allowing a prior act of witness tampering to prove intent under the Federal Rules of Evidence 404(b), which is virtually identical to NRS 48.045).

Additionally, the fact that the ski mask which was found near the body of Michael Miller had no holes or blood is extremely probative when one considers the prior acts.

The State next agues that the prior acts are admissible to prove preparation, plan, and knowledge under NRS 48.045. "Evidence under the 'common plan or scheme' exception must tend to prove the charged crimes by revealing that the defendant planned to commit the crimes. The offense must tend to establish a preconceived plan which resulted in commission of the charged crime." *Brinkley v.*

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State, 101 Nev. 676, 679–80, 708 P.2d 1026, 1028 (1985) (citing *Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980)); *see also Tillema v. State*, 112 Nev. 266, 268–69, 914 P.2d 605, 606–07 (1996).

Here, the State has provided grounds which establish strikingly similar acts. Defendant, in both instances, discovered his wife shot to death in the home. Defendant was the beneficiary of hundreds of thousands of dollars in life insurance benefits. Moreover, each fatal incident involved a triangle of Defendant, acquaintance of Defendant, and his wife.

Considering also that Defendant admits to shooting Michael Miller, and knowing him prior to the incident, the proffered evidence is probative to show defendant's preparation, plan, and knowledge. *See Thompson v. State*, 102 Nev. 348, 721 P.2d 1290 (1996); *see also Brinkley v. State*, 101 Nev. 676, 708 P.2d 1026 (1985).

Finally, in regards to identity, and as noted in *Fields v. State*,

> [E]vidence of prior criminal behavior may only be admitted to prove identity when its prejudicial effect is outweighed by the evidence's probative value and when that prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity is in question.

220 P.3d 709, 74–15 (Nev. 2009) (quoting *Canada v. State*, 104 Nev. 288, 292-93, 756 P.2d 552, 554 (1988). In the instant case, the probative value of the evidence the State seeks to admit outweighs the prejudicial effects. For the reasons stated herein, there is a serious issue as to the true identity of the individual who orchestrated the crime charged. The prior acts sought to be introduced by the State conform with standards set forth in NRS 48.045.

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COURT FINDS, the prior acts are relevant to the crime charged, and the State may seek to admit evidence which tend to show motive, intent, preparation, plan, knowledge and identity pursuant to NRS 48.045.

COURT FINDS, the probative value of the prior acts are not substantially outweighed by the danger of unfair prejudice.

B. The Acts have been Proven by Clear and Convincing Evidence

COURT FINDS, the State has proven the prior acts by clear and convincing evidence. The testimony of William McGuire, and the offer of proof regarding Eric Tarantino reflects that each possesses a substantial basis of independent facts establishing the occurrence of both acts. For example, Mr. McGuire testified that he arrived at the Defendant's residence shortly after Becky Randolph's death. McGuire testified that actively investigated Defendant's prior murder case.

Mr. McGuire further testified that he was aware that Defendant sought to tamper with witness, Eric Tarantino. Importantly, Defendant pled guilty to tampering with Eric Tarantino, who was a witness in the criminal trial surrounding Becky's death.

While a guilty plea is not necessarily conclusive as to whether an individual actually committed the crime charged, here the State is not required to prove beyond a reasonable doubt that Defendant committed the prior acts. *See Dowling v. United States*, 493 U.S. 342, 349, 110 S. Ct. 668, 672 (1990) (noting that "[acquittals] do not prove that the defendant is innocent, it merely proves the existence of a reasonable doubt as to his guilt."). Moreover, while Defendant's guilty plea is not conclusive as to guilt, the State has presented factually

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independent evidence which illustrates that Defendant actually solicited an undercover informant to kill Tarantino. The Defendant sought to exchange financial compensation for the commission of the crime.

The State further alleges that prior to Becky's death, Defendant made detailed admissions to Eric Tarantino involving proposals to kill Becky Randolph. This must be analyzed in conjunction with the fact that Randolph discussed with Tarantino, among other proposals, staging a "burglary" in order to cover-up the murder of Becky.

Again, it must be noted that McGuire's testimony was not being offered by the State to show propensity, but rather to show that Defendant's participation as it relates to NRS. 48.045(2). At the *Petrocelli* proceedings in this case, the State further acknowledged that Mr. McGuire's testimony or the testimony of other witnesses presented by the State, would be limited at trial in accordance with *Zana*.

Furthermore, the State's offer of proof regarding Eric Tarantino establishes that Defendant spoke with Tarantino regarding plans to murder Becky Randolph. The proposed evidence involving Tarantino also reflects that he was aware that Defendant sought to have him killed during the course of the Utah case. Thus, the proposed evidence involving Tarantino highlights direct admissions from Defendant.

COURT FINDS, the State has proven that the Defendant committed the prior acts by clear and convincing evidence.

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CERTIFICATE OF FACSIMILE

On the 17th day of September, 2010 a copy of the foregoing Decision was faxed to: David Stanton, Esq. at (702) 477-2974, Robert Daskas, Esq. (702) 477-2978, Eric B. Bryson, Esq. at (702) 364-1442, Yale L. Galanter, Esq. at (305) 576-0244 and (954) 760-9040.

By: _____
Carrie Alper
Judicial Executive Assistant
to Judge Stefany Miley
Department 23

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
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IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM RANDOLPH, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK and THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE, Respondents. STATE OF NEVADA, Real Party In Interest.	No. Case No. C250966 Dept. XXIII **Expedited Review Requested**

PETITION FOR WRIT OF PROHIBITION/MANDAMUS

COMES NOW, the Petitioner, THOMAS RANDOLPH, by and through his attorneys, E. BRENT BRYSON, ESQ. and YALE L. GALANTER, ESQ., and respectfully petitions this Honorable Court to direct the trial court to (a) rehear the evidentiary hearing in accordance with *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) without inadmissible hearsay, and (b) to rule as a matter of law that acquitted conduct cannot be used under NRS 48.045, and (c) that Randolph''s 1989 conviction for third-degree witness tampering in connection with allegedly attempting to have a witness killed is too prejudicial to be admitted at his upcoming murder trial where the State is seeking the death penalty.

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This Petition is based upon all the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, controlling federal and U.S. Supreme Court case law, the Nevada Constitution, and the Constitution of the United States.

DATED this ____ day of December, 2011.

E. BRENT BRYSON, LTD.

By _____
E. BRENT BRYSON, ESQ.
Nevada Bar No. 4933
3202 W. Charleston Blvd.
Las Vegas, Nevada 89102
Co-counsel for Petitioner

YALE . GALANTER, P.A.

By _____
YALE E. GALANTER, ESQ.
3730 N.E. 199th Terrace
Aventura, Florida
Co-counsel for Petitioner Pro Hac Vice

DECLARATION OF E. BRENT BRYSON

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

E. BRENT BRYSON, being first duly sworn, deposes and says:

1. That affiant is an attorney duly licensed to practice law in the State of Nevada and is one of the attorneys retained to represent THOMAS WILLIAM RANDOLPH in this matter.

2. That Randolph authorized me to file the instant Petition for Writ of Prohibition/ Mandamus. That the State is seeking to execute Randolph on the extremely circumstantial evidence in this case.

3. That Randolph, hereinafter "Petitioner," is pursuing this extraordinary Writ because the trial court abused its discretion by: (a) ruling at a *Petrocelli v. State* evidentiary hearing that inadmissible hearsay will be allowed at trial; (b) that as a matter of law that acquitted conduct can be used under NRS 48.045, and (c) that Randolph''s 1989 conviction for third-degree witness

tampering in connection with allegedly attempting to have a witness killed is not too prejudicial to be admitted at his upcoming murder trial. The combined effect of these rulings has crippled Petitioner's ability to properly defend the instant murder charges and violates Randolph's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution, as well as Article 1, of the Nevada Constitution.

4. That extraordinary relief is warranted because Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law. The trial court''s rulings have negated the Petitioner''s ability to fully and fairly litigate the admissibility of evidence at trial. The erroneous procedures fashioned by the trial court would allow the prosecutor to convict and kill petitioner on wholly inadmissible evidence. The evidentiary hearing conducted in the manner by the trial court provides no due process or equal protection to the accused. It also denies petitioner his Fifth Amendment double jeopardy protections. Petitioner would be irreversibly prejudiced by such a proceeding, since the improper admission of hearsay testimony a evidence at a *Petrocelli* hearing is generally reviewed under the permissive "harmless error" standard. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Mendoza v. State*, 122 Nev. 267, 277 fn.28 (2006). The trial court's rulings have deprived the accused of a fair chance to litigate the above referenced serious constitutional violations. The current state of affairs is unacceptable in a capital case.

5. That extraordinary time and money would be expended if the court addresses these issues for the first time of on an appeal after a conviction. Judicial economy would be better served to correct the aforementioned

erroneous decisions pretrial.

6. Part of the State's tactics in compensating for a completely circumstantial case is by attempting to introduce "evidence that Randolph had been previously acquitted of murdering his ex-wife Becky in Utah and allegedly stating he would leave no witnesses next time. In addition, the State has requested to introduce evidence of Randolph''s guilty plea to witness tampering in the Utah case. However, the State fails to support its alleged facts with any admittable evidence. Instead, the State spins a tall tale ostensibly pieced together from hearsay and media accounts of the Utah case (which occurred over twenty years ago) in conjunction with the uncredible and self-serving statements of Eric Tarrantino (who testified at the Utah trial).

7. The State spins its "story" with inflammatory statements and innuendo. The State begins their "tale" by stating that Thomas Randolph has been married six times, and that four of those wives are dead. While this is true, the manner in which the State asserts this statement suggests that Randolph is in the habit of killing wives. In actuality, Thomas Randolph has two living ex-wives, one ex-wife who died of cancer (after they were divorced), and one wife who died as a result of medical malpractice from a botched surgery (which resulted in a civil suit that was resolved in Randolph''s favor).

8. The State also erroneously asserts that Randolph took out life insurance policies on both Becky Randolph and Sharon Randolph before they died. However, the State makes no mention of the fact that Randolph was the beneficiary of all of his wives' insurance policies **and that they were the**

beneficiaries of his life insurance policies as well. The State also makes note of the fact that both Becky and Sharon were killed by gun shot wounds to the head. However, the paramount issue in the Utah murder case was whether Randolph had shot his wife Becky, while it is uncontroverted in this case that Sharon was shot in Las Vegas by Michael Miller.

9. The State additionally asserts the fact that Randolph went to his father's house in Utah to call 911 after discovering Becky''s body, suggesting that such action was improper. However, the State fails to mention that the Randolph's phone service had been disconnected in the home where Becky was found, and this case predated the widespread use of the cell phones.

10. In another inflammatory allegation, the State claims that Randolph asked Tarrantino to kill Becky in 1982 and then tried to convince Tarrantino to kill Becky in February of 1983, after Tarrantino had left his job working with Randolph and began working elsewhere. However, Randolph married Becky in April of 1983. If it is the State's contention that Randolph marries women and kills them for life insurance benefits, it would be rather absurd to accept that Randolph tried to hire Tarrantino to kill Becky before he became the named beneficiary of her life insurance policy.

11. The State also preposterously asserts that Tarrantino witnessed Randolph's attempt to kill Becky in a mobile home fire based on Tarrantino''s statement that he had a "feeling" that a fire was started after he admittedly consumed four to five beers and stated that he, Tarrantino, was the one that actually arranged the clothes to catch fire on candles inside the mobile home. In addition, the fire was ruled accidental at the time. Furthermore, the State attempts to persuade this court that Tarrantino told Becky that the fire

was set on purpose to kill her, but that Becky remained married to Randolph for almost two more years prior to her death.

12. Last, the State erroneous asserts that Randolph pled guilty to witness tampering for his "attempt to have Tarrantino killed." Ignoring the absurdity that the State of Utah and the Utah Court would allow a plea to witness tampering in lieu of a conviction for solicitation to kill, there is no evidence or record that the guilty plea to witness tampering was an admission that Randolph tried to have Tarrantino killed. Randolph pled guilty to tampering with a witness, not trying to kill one. Indeed, as set forth later in this opposition, there were multiple issues surrounding Randolph''s plea.

13. In essence, the "facts" provided by the State to support the admission of evidence of the Utah case are inflammatory and speculative and thus not admissible to prove any alleged prior bad acts.

14. On January 7, 2009, an Indictment was filed against Petitioner based on a grand jury return. The charges are Conspiracy to Commit a Crime, Murder with use of a deadly weapon and burglary with use of a deadly weapon. Exhibit A.

15. On January 21, 2009, Randolph pled not guilty and a status check date was set.

16. On January 28, 2009, the State notified Defendant's counsel of it's intent to seek the death penalty against Petitioner. Exhibit B. A trial date was set.

17. On September 23, 2009, the State filed a Motion to Admit Prior Bad Acts. Exhibit C.

18. Petitioner filed his Opposition to the Motion to Admit Prior Bad Acts on

November 16, 2009. Exhibit D.

19. The State replied on November 19,. 2009. Exhibit E.

20. On December 17, 2009, the lower court felt that it did not have enough information to rule on the motion. It ordered the State to provide more information within thirty days.

21. On July 30, 2010, the trial Court conducted an evidentiary hearing (*Petrocelli)*. A transcript of the proceeding is attached as Exhibit F.

22. On September 22, 2010, the trial Court entered a "Decision" granting the State's Motion to Admit Evidence of Prior Bad Acts. Exhibit G. At the evidentiary hearing, the State only called one witness, Kent McGuire, Chief Deputy County Attorney in Davis, Utah. (The District Attorney that tried to convict Randolph in Utah.)The State did not present any percipient fact witnesses other than McGuire who's testimony was based solely on hearsay. Supposedly, at some point, the State will produce "live witness testimony." However, the *Petrocelli* hearing was comprised of complete hearsay——no investigating detectives, no police officers, no witnesses and certainly no admissible evidence of allegations of a prior murder in the State of Utah. The sole admissible document was a judgment of conviction for witness tampering from Utah in 1989.

23. No Motion for Stay of Proceedings has been sought in the district court at this time. Said motion is being filed commensurate with this Petition. The trial date in this case is currently set for January 3, 2012.

E. BRENT BRYSON

POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

(a) Should this Court intervene and have the lower court rehear the evidentiary hearing in accordance with *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) without inadmissible hearsay?

(b) Determine whether acquitted conduct is inadmissible as a matter of law and therefore cannot be used under NRS 48.045?

(c) Did the trial court manifestly err in allowing Petitioner's 1989 conviction for third-degree witness tampering in connection with allegedly attempting to have a witness killed to be admitted at Petitioner's upcoming murder trial?

II. SUMMARY OF THE CASE

A. Alleged Bad Acts Cannot be Shown by Hearsay

Hearsay is not admissible at trial, even if it comes in the form of bad act evidence under NRS 48.045. A *Petrocelli* hearing is the time to present admissible evidence so that the defense has a right to confront and cross-examine the potential evidence. Moreover, the trial court needs to hear admissible evidence at said hearing to make a fair ruling on if the alleged evidence has been proven by clear and convincing evidence as well as weighing the probative value versus the danger of unfair prejudice. The alleged "proffer" in this case does not satisfy the confrontation clause of Article I and the Fifth and Sixth Amendments. Because the trial Court clearly erred in allowing hearsay to be admissible under NRS 48.045, this Writ should issue and the case should be remanded for a new *Petrocelli* hearing at which the prosecution must present admissible evidence.

...

...

B. Acquitted Conduct is not Admissible as a Matter of Law

Petitioner was found **not guilty** of murder charges stemming from the death of his ex-wife Becky by a jury of his peers in Utah over twenty years ago. However, the trial Court is allowing the State to resurrect the Utah case, knowing full well it cannot meet the high standard of review under our evidence code. Under the law of Utah, and the United States, a jury found that reasonable doubt existed as to whether the Petitioner had committed murder. While the trial Court ruled that this evidence may be admitted in the current proceeding under the standard of clear and convincing evidence, it is a fine line between clear and convincing evidence and proof beyond a reasonable doubt. Petitioner submits that this Court should not substitute its judgment for the judgment of the Utah jury. Thus, this Honorable Court should grant the writ and order Respondent to exclude the State from introducing the evidence concerning the Becky Randolph case of which the Petitioner was acquitted. Even the mention of Petitioner being charged with murder in Utah is a bell that cannot be unrung with any type of a limiting instruction.

C. Petitioners 1989 Conviction is Unduly Prejudicial

The Utah tampering case was and is highly suspect. There were issues of dishonesty of the police despite Petitioner's plea to the charge. The Attorney General's office for the State of Utah realized that Petitioner was illegally sentenced, despite his plea to the charge. A neutral prosecutor reviewed the case and determined that the factual allegations adopted by t he judge in accepting the plea where untrue. This alone is enough to exclude the prior conviction based on NRS 48.045.

Additionally, the State is attempting to, and the trial Court is allowing it to retry a case, based on information and "evidence" that is incomplete, decades old and that has been expunged. However, even when the case was fresh in the minds of witnesses, and the forensic evidence was available, a jury still found Randolph innocent of murder. The

State's attempted resurrection of the Utah murder case with spotty evidence is clearly inadmissible. Nothing provided by the State in the discovery phase of this case rises to the level of clear and convincing evidence. In fact, much of it appears to be based on hearsay from the media and the speculation of witnesses who were either adjudicated as not credible or who are no longer available to be cross-examined. As such, it is clear that the trial Court manifestly erred in finding that the "clear and convincing" standard to admit evidence of alleged prior bad acts was met in the case at bar.

The trial Court relied on several cases that allegedly support its position that an acquittal in an earlier trial may be introduced as prior bad act evidence in a subsequent criminal trial. Aside from the contention that this argument is fundamentally flawed and inconsistent with Nevada law, and the United States Constitution, none of the cases cited in the so called "Decision" involved a capital murder charge. Thus, because of the prejudicial nature and the fact that subsequent investigation found the tampering charge unfounded, the prior conviction for alleged witness tampering should not be admissible. A writ explaining this finding should issue and the matter remanded back to district court for further proceedings.

III. WHY A WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY IN THIS CASE

A writ of mandamus may issue to "...compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Redeker v. Eighth Judicial District Court*, 122 Nev. 164, 167 (2006), *Savage v. Third Judicial District Court*, 200 P.3d 77, 81 (2009); NRS 34.160. Additionally, this Court may exercise its discretion to ".....grant mandamus relief where an important issue of law requires clarification." *Redeker* at 167. Mandamus is an extraordinary remedy, and ".....does not issue where the petitioner has

a plain, speedy, and adequate remedy in the ordinary course of law." *Id.*, also see NRS 34.170. Furthermore, this Court has exercised its discretion to grant extraordinary relief where "...an important issue of law needs clarification and public policy is served by this Court''s invocation of its original jurisdiction..." *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 67 (1998). This Court has recognized that "...the ability to appeal a final judgment may not always constitute an adequate and speedy remedy that precludes writ relief, depending on the ''underlying proceedings status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.'' *Williams v. Dist. Ct.*, 127 Nev. Adv. Op. No. 45 (July 28, 2011), citing *D.R. Horton v. Dist. Ct.*, 123 Nev. 468, 474-75 (2007).

In the case at bar, Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law for the trial court's erroneous rulings. The combined effect of these rulings will be a complete deprivation of Randolph's ability to fully and fairly litigate his Fifth Amendment rights. This issue can only be reviewed prior to trial. This is so because if Petitioner is acquitted at trial, there will be no appeal. If Petitioner is convicted, and the Court grants Petitioner's appeal judicial resources and time will be needlessly expended when this Court could decide the issue now.

Concerns of judicial economy also militate heavily in favor of addressing the merits of this petition. As this Court has stated, when it comes to deciding whether extraordinary relief is warranted, "[u]ltimately, however, our analysis turns on the promotion of judicial economy." *Williams v. Dist. Ct.*, 127 Nev. Adv. Op. No. 45 (July 28, 2011), citing *Smith v. Dist. Ct.*, 113 Nev. 1343, 1345 (1997) ("The interests of judicial economy... will remain the primary standard by which this court exercises its discretion.") The trial court's rulings in this case, if allowed to become precedent throughout the Eighth Judicial District Court, will necessitate a flood of litigation

presenting the same issues as this petition. This litigation is wasteful and unnecessary, given the clear, unambiguous direction of *United States v. Mejia, Jackson v. Denno*, and the other authority cited by the Petitioner. The trial court's rulings should be corrected before they are repeated. Given this Court's heavy docket, an ounce of prevention is worth several pounds of cure.

IV. ARGUMENT

A. THE DISTRICT COURT ERRONEOUSLY RELIED ON HEARSAY TO GRANT A MOTION FOR PRIOR BAD ACTS

This Court should reverse the trial Court's decision entered in writing approximately one year ago. The Court heard from one witness and only one witness. At the time of the *Petrocelli* hearing, the State sought to admit pursuant to NRS 48.045, two prior acts allegedly involving the defendant centering around an alleged murder for hire plot. The prosecutor cannot testify as to what supposedly took place more than twenty years earlier. The rules of evidence are not suspended in a hearing to admit prior bad acts. The law is clear that hearsay is not admissible, and NRS 48. 045 nor any portions of the evidence code allow for an exception to this rule under the circumstances as alleged herein. The trial Court clearly erred by allowing a "proffer" as a substitute for an actual evidentiary hearing. Thus, this Writ should issue.

The State presented the testimony of a Chief Deputy District Attorney in Utah, no other witnesses were presented. No percipient witnesses to the alleged incidents were presented. The only testimony was a so called "proffer of the evidence by [the State] representing that live witness testimony would be adduced at the time of trial. These witnesses would include the investigating detectives, police officers and witness, Eric Tarrantino. According to the State, these witnesses would only testify according to their own memory (recordings) and recollections." (Decision at pp. 1-2). Only admissible evidence is allowed at a hearing and subsequently at trial. There is no so called "proffer"

evidence. Hearsay is not admissible at a *Petrocelli* hearing nor at trial. NRS 48.045 does not vitiate the rules of evidence. In fact, when this Honorable Court examines the head notes under the aforementioned statute, it will notice a section on hearsay. According to Nevada Law, hearsay is not admissible under NRS 48.045. *See, State v. McKay*, 165 P.2d 389, 63 Nev. 118 (1946)(the portions of Sheriff's Affidavit relating to his having "learned" that the defendant has previously been confined in Utah Penitentiary for burglary and that he had escaped from the guard house at Army camp were inadmissible in a murder prosecution is hearsay, and also because the relation to past offenses having no connection with the instant case.)

In a drug case involving a procuring agent defense the Supreme Court noted that hearsay is not admissible under NRS 48.045(2). *Collon v. State*, 938 P.2d 714 (1997). In the *Collon* case, the defense counsel objected to testimony on the grounds that it was hearsay and irrelevant character evidence. The District Court ruled that no hearsay had been presented and that the evidence was admissible under NRS 48.045(2), which permits evidence of other bad acts that show intent, preparation, and proof of motive. This Court affirmed the District Court decision. *Id.* Even before *Petrocelli* case, this Court has made it clear that bad act evidence still must satisfy proper evidentiary scrutiny. *Dorsey v. State*, 96 Nev. 951, 620 P.2d 1261 (1980).

Based on the forgoing, this Court should find that the trial Court's decision to allow hearsay as a substitute for actual evidence is unconstitutional and contravenes repeated prior decisions by this Court. The alleged "proffer" testimony by the State does not satisfy the rules of evidence. Petitioner is entitled to have percipient witnesses testify at the hearing so that he may sufficiently confront and cross-examine the witnesses as provided for in Article 1 sections 3 and 8 of the Nevada Constitution as well as the Fifth and Sixth Amendments of the Federal Constitution. Since the prosecution has presented

nothing but inadmissible evidence and the lower court found this to be lawful, the Writ should issue and the matter remanding for a new *Petrocelli* hearing.

B. THE TRIAL COURT CLEARLY ERRED BY ALLOWING EVIDENCE OF WHICH PETITIONER WAS ACQUITTED.

Petitioner was found **not guilty** of murder charges stemming from the death of his ex-wife Becky in Utah by a jury of his peers. However, the trial Court is now allowing the State to resurrect the Utah murder case, which is over twenty years old, knowing full well it cannot meet the high standard of review under our evidence code. Under the law of Utah, and the United States, a jury found that reasonable doubt existed as to whether Thomas Randolph had committed murder. While the State argues that this evidence may be admitted in the current proceeding under the standard of clear and convincing evidence, it is a fine line between clear and convincing evidence and proof beyond a reasonable doubt. Petitioner submits that the trial Court substituted its judgment for the judgment of the Utah jury. Thus, this Honorable Court should grant the writ and Order the trial Court to exclude the State from introducing any evidence concerning the Becky Randolph murder case.

The trial Court relies on the United States Supreme Court's finding that in limited circumstances evidence of a prior bad act may be admitted, even if the defendant had been previously acquitted of the charges constituting that act. *Dowling v. United States*, 493 U.S. 342, 349 (1990). In *Dowling*, the court was relying on Federal Rule of Evidence 404, which allows the admission of relevant bad acts so long as they can be proven by a preponderance of the evidence, which is a much lower standard than Nevada's requirement that prior bad acts be proven by clear and convincing evidence.

Furthermore, the circumstances in the *Dowling* case are readily distinguishable from the circumstances in the instant case. In *Dowling*, the prosecution brought in

testimonial evidence of a woman who claimed that the defendant had robbed her in her home in a similar manner as the defendant was accused of robbing a bank only two weeks later. The Defendant in *Dowling* was acquitted of the home invasion robbery, but the prosecution believed that this evidence would be probative in identifying the Defendant as the man who robbed the bank.

In this case, the identities of the parties involved is uncontroverted. Michael Miller shot and killed Sharon Randolph, and in turn Thomas Randolph shot Michael Miller. To date, the prosecution has provided no evidence to support a nexus between the Utah cases and the Las Vegas case, beside mere speculation and conjecture. In the *Dowling* case, the prosecution was aware of how the crime had occurred, but simply needed to identify the parties involved. In this case, the prosecution is trying to prove a sequence of events occurred, of which there is no additional proof, by dredging up accusations that are over two decades old and which were found to be without sufficient proof to sustain a conviction in the Utah case.

It is clear from the dearth of evidence in the present case, that the State would have no reason to even suspect that Randolph hired Miller to kill Sharon Randolph, had Randolph not been tried in Utah for the murder of Becky and pleading to the witness tampering case. Simply put, all evidence in this case points to a self-defense shooting in a home invasion and the State is trying to use a past acquittal to introduce highly prejudicial evidence that has no probative value in proving the events in this case.

The trial Court also relied on the case of *Charles v. Hickman*, 228 F.3d 981, 986 (9th Cir. 2000), for the same legal principal as was set forth in the *Dowling* case. However, the Court's reasoning is important. In that case the State presented evidence at Charles'' trial for the murder of Mitchell, that Charles stabbed an individual by the name of Bonton in retaliation for Bonton's having snitched on him regarding an earlier robbery.

The Court held that the evidence was relevant to show that Charles shot the victim, not in self-defense, but rather in retaliation for Mitchell also having snitched on him regarding the robbery. The prosecution presented the evidence in Bonton pursuant to *California Evidence Code* §§1101, which, like *Federal Rule of Evidence* 404(b), permits the introduction of prior bad acts. "Evidence of the Bonton stabbing admitted under §§1101 did not need to be proved beyond a reasonable doubt **but rather by a preponderance of the evidence**." (Emphasis added.) *Charles*, 228 F.3d 986. Because the introduction of the Bonton stabbing in the murder trial was governed by a preponderance of the evidence standard of proof (instead of the beyond a reasonable doubt standard in the original stabbing trial), the government was not precluded from re-litigating the issue. A jury could have believed that Charles more likely than not stabbed Bonton in retaliation for snitching, but did not believe it beyond a reasonable doubt. Accordingly, the evidence was not barred by the collateral estoppel rule. *Id.* Again, it is clear from Ninth Circuit law that the pivotal decision was made based on a much lower evidence standard than required in Nevada.

Furthermore, Nevada law recognizes that clear and convincing evidence is a higher legal standard than that of preponderance of the evidence. See *Means v. State*, 120 Nev. 1001, 1014 (2004). While clear and convincing evidence is a lower standard than reasonable doubt, it is a level of evidence far above that which was interpreted by the United States Supreme Court in the *Dowling* case or by the Ninth Circuit in the *Charles* case. In addition, other jurisdictions have found that a prior acquittal is not admissible as bad act evidence. See *State v. Bell*, 594 S.E.2d 824, 826-27 (2004); *State v. Kilgore*, 53 P.3d 974 (2002); *State v. Cuen*, 736 P.2d 1194 (1987). As such, the trial Court has failed to show that evidence of an alleged bad act, of which the defendant was acquitted, is admissible under *NRS* 48.045. It was manifest error for the trial Court to allow evidence

of Petitioner's acquitted conduct. Thus, the Petitioner submits that a writ should issue with findings consistent with Petitioner's argument.

C. THE UTAH CASE WAS BASED ON DISHONEST AND UNFOUNDED ALLEGATIONS AND AS SUCH IS SUSPECT AND HIGHLY PREJUDICIAL.

The trial Court ruled at the hearing that evidence of Petitioner''s plea of guilty to witness tampering in the Utah case could be used at Petitioner''s upcoming capital murder trial. Though it is true that Petitioner did plead guilty to the charges, The Second Judicial District Court of Utah explicitly found the following:

> The information tends to show that the investigating officer was dishonest in his investigation, that witnesses Williams and Tarrantino are self-serving, conniving and dishonest, and that the defendant was a victim of the system and forced into tampering with a witness in order to protect himself.

(See first attachment to Exhibit D)

Despite the aforementioned findings, the Utah Court chose to uphold Petitioner's sentence. However, the Deputy Attorney General assigned to represent the State of Utah on Randolph''s Habeas Corpus petition found the sentence to be unfair, stating:

> I represent the State of Utah in my capacity as an Assistant Attorney General for the State of Utah. I became involved in representing the State on a writ of habeas corpus that Tom Randolph filed. In my review of his case it became evident that he had been illegally sentenced based upon factual allegations that were untrue but adopted by the judge. I reviewed the case with Carvel Harward, the Davis County Attorney that prosecuted the case. We jointly decided that Mr. Randolph had been illegally sentenced and we stipulated to a new sentencing.

(See second attachment to Exhibit D)

In the Utah Assistant Attorney General's view of the case, it became evident that the sentence was illegal based on the factual allegations that were untrue but adopted by the judge. Based on that, the parties stipulated to a new sentencing. The result had such an impact on the Utah judge that the re-sentencing resulted in Randolph receiving probation.

In order to better clarify the preclusive effect of Randolph's acquittal on the admissibility of Tarrantino's testimony, the Defendant offers the Sixth Circuit's persuasive statement that,

> . . . collateral estoppel only prohibits the government from relitigating *issues* which had previously been decided in the defendant's favor. This Court stated that in making a collateral estoppel ruling the court must first determine what the government is attempting to prove through reintroduction of the prior conduct evidence. The court must next determine whether that same issue had been decided by an earlier jury in the defendant''s favor. If the court finds that the issue has been so decided in the defendant's favor, collateral estoppel prohibits the admission of the prior conduct evidence.. *United States v. Johnson*, 697 F.2d 735, 740 (6th Cir. 1983).

In this case, it is impossible to determine whether a jury could have acquitted Randolph without Tarrantino's testimony because the trial transcript no longer exists. Furthermore, it is clear that the State is attempting to bring in the testimony of Tarrantino in order to show that Randolph had attempted to kill Becky Randolph and until Tarrantino to do the job, and furthermore to show that Randolph would not leave any witnesses this time. However, with no record to review it is impossible to determine whether the jury could have "rationally acquitted the defendant" and yet still believe Tarrantino''s testimony.

Furthermore, Respondent ruled that the "facts" of the Utah case were primarily gleaned from "trial transcripts, officer's reports, and witness statements." However, in the Utah case Randolph successfully petitioned the court to expunge the records of that case and the State has failed to produce any certified trial transcripts in the requested discovery. Additionally, as the court well knows, any trial transcript would need to be authenticated, and the court reporter of the Utah trial is unfortunately deceased. In addition, the lead defense attorney on the case is deceased and the file has been destroyed (a fact confirmed by Petitioner's attorney, E. Brent Bryson's face to face conversation

with Bernard Allen, Esq., the second chair on the Utah murder trial, in Ogden, Utah).

Respondent is wrongfully allowing the State to retry a case, based on information and "evidence" that is incomplete and decades old. However, even when the case was fresh in the minds of witnesses, and the forensic evidence was available, a jury still found Randolph innocent of murder. The State's attempted resurrection of the Utah case with spotty evidence is clearly inadmissible. Nothing provided by the State in the discovery phase of this case rises to the level of clear and convincing evidence. In fact, much of it appears to be based on hearsay from the media and the speculation of witnesses who were either adjudicated as not credible or are no longer available to be cross-examined. As such, it is clear that the trial Court did not receive the requisite evidence necessary to meet the "clear and convincing" standard to admit evidence of Petitioner's alleged prior bad acts. This was clear error by the trial Court. Thus, this Writ should issue finding that despite his plea, Petitioner's conviction for witness tampering is inherently unreliable and highly prejudicial.

CONCLUSION

Clearly, hearsay was adduced from the only witness at the *Petrocelli* hearing. This is insufficient evidence and violates decades of this Court's clear mandate that a Court must consider admissible evidence at the *Petrocelli* hearing. There is also not an appreciable difference between the reasonable doubt standard and the clear and convincing standard warranting this Court to substitute its judgment over the judgment of a jury of Petitioner's peers in the Utah murder case. Likewise, there is sufficient doubt as to the facts and circumstances surrounding Randolph's plea to witness tampering. The aforementioned testimony and evidence is the type of highly prejudicial testimony that this Honorable Court has repeatedly deemed suspect. Both of the alleged prior bad acts (which occurred in Utah over two decades ago) should have been excluded from trial.

Based upon the foregoing, it is respectfully submitted that this Court grant this pretrial extraordinary writ to preserve precious judicial resources, time, money, and potentially a man's life.

DATED this ____ day of December, 2011.

E. BRENT BRYSON, LTD.

By _____
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DECLARATION OF MAILING

Jayme Martinez, an employee with Office, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 1st day of December 2011, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of the PETITION FOR WRIT OF PROHIBITION/MANDAMUS in the case of THOMAS RANDOLPH, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK, THE HONORABLE STEFANY MILEY, Case No. C250966, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to:

Honorable Judge
Stefany Miley
District Court, Dept. XXIII
200 Lewis Avenue
Las Vegas, NV 89101

David Roger
Clark County District Attorney
Attn: Appellate Division
200 Lewis Avenue 3rd Floor
Las Vegas, NV 89101

Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV 89701-4717

That there is a regular communication by mail between the place of mailing and the place so addressed.

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

EXECUTED on the 1st day of December, 2011.

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LIST OF EXHIBITS

Exhibit A: INDICTMENT, filed January 7, 2009

Exhibit B: NOTICE OF INTENT TO SEEK DEATH PENALTY, filed January 28, 2009

Exhibit C: MOTION TO ADMIT PRIOR BAD ACTS, filed September 23, 2009

Exhibit D: OPPOSITION TO MOTION TO ADMIT PRIOR BAD ACTS, filed November 16, 2009

Exhibit E: REPLY TO OPPOSITION TO MOTION TO ADMIT PRIOR BAD ACTS, filed November 19, 2009

Exhibit F: Transcript of Hearing - July 20, 2010

Exhibit G: Decision, entered September 22, 2010