IN THE SUPREME COURT OF THE STATE OF NEVADA

DONOVINE MATHEWS, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 72701

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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Respondent.	)	
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APPELLANT'S OPENING BRIEF

The appellant, Donovine Mathews ("Donovine"), appeals from his judgment of conviction pursuant to **NRAP 4(b)** and **NRS 177.015.** Donovine's judgment of conviction was filed on March 10, 2017. (Appellant's Appendix Vol. II:449-50).[1] This Court has jurisdiction over Donovine's appeal, which was timely filed on March 23, 2017. (II:451). See **NRS 177.015(1)(a).**

ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals because Donovine went to trial and was convicted of a Category B felony:

[1] Hereinafter, citations to the Appellant's Appendix will start with the volume number, followed by the specific page number. For example, (Appellant's Appendix Vol. II:449-50) will be shortened to (II:449-50).

Child Abuse, Neglect or Endangerment with Substantial Bodily Harm. See NRAP 17(b)(2).

ISSUES PRESENTED FOR REVIEW

I. **The district court abused its discretion with respect to expert testimony.**

II. **The district court abused its discretion with respect to reciprocal discovery.**

III. **The district court unfairly restricted Donovine's right of cross-examination.**

IV. **The district court improperly denied Donovine's requested jury instruction regarding accident/misfortune.**

V. **The district court prevented Donovine from arguing his theory of the case in closing.**

VI. **The district court's application of double standards throughout trial violated Donovine's rights to an impartial tribunal and equal protection under the laws.**

VII. **Cumulative error requires reversal.**

STATEMENT OF THE CASE

On March 3, 2016, the State filed an information in district court, charging Donovine with one count of child abuse, neglect or endangerment with substantial bodily harm. (I:5-6). The State claimed that Donovine abused his girlfriend's 2-year old son CJ by intentionally burning his hands with hot water. (I:5-6). Donovine pled not guilty and invoked the 60-day rule. (II:460).

On March 24, 2016, the State identified Dr. Sandra Cetl and Phylip Peltier as expert witnesses who would testify that CJ's injuries were intentionally inflicted. (I:99-100). On March 31, 2016, Donovine waived the 60 day rule so he could retain his own expert to show that CJ's injuries were accidental. (II:461,496-97).

Donovine filed a discovery motion on May 23, 2016. (I:137-165). On July 14, 2016, the State opposed Donovine's discovery motion and moved for reciprocal discovery. (I:166-198). Although the court granted the State's motion without qualifications, it did not order the State to comply fully with **NRS 174.235**. (II:466-67).

Jury trial was scheduled to begin on October 25, 2016. (III:468). On October 3, 2016, Donovine filed a timely notice of expert witnesses pursuant to **NRS 174.234(2)**, identifying Lindsey "Dutch" Johnson, Ph.D as a Forensic and Biomechanics Expert. (I:201).

On October 19, 2016, the State filed a motion to continue the trial based on alleged outstanding discovery related to the defense's biomechanics expert. (I:211-224). Donovine opposed the State's motion on October 21, 2016. (I:228-234). The court granted the State's request for a continuance. (II:473).

On December 16, 2016, the State filed a motion *in limine* to strike or limit the testimony of Donovine's biomechanics expert, Dr. Johnson. (I:239-50; II:251-259). Donovine opposed the motion on December 30, 2016 and supplemented his opposition on January 6, 2017. (II:361-86).

A five day jury trial began on January 9, 2017. (II:476-86(b)). On January 10, 2017, the district court began an evidentiary hearing to decide whether Dr. Johnson was qualified to give his expert opinion. (II:479). Before Dr. Johnson could finish laying the foundation for his testimony, the court asked him to step down and exit the courtroom. (II:479). The court ruled that Dr. Johnson could not testify because his opinion lacked "foundation". (II:479).

On the second day of trial, the State's child abuse expert, Dr. Cetl, testified that Donovine's accidental burn theory was "impossible". (V:1189-90). When Donovine asked that Dr. Johnson be permitted to refute Dr. Cetl's opinion, the court denied that request. (V:1189-90).

On the third day of trial, the State disclosed three pages of handwritten notes prepared by the State's burn expert Peltier. (II:481-82). Donovine moved for a mistrial, or in the alternative to exclude Peltier as a witness, or in the alternative to permit Dr. Johnson to testify. (II:482). The

court denied all three requests, finding that the State was never obligated to disclose Peltier's notes. (II:482).

After Peltier testified, directly refuting testimony that Dr. Johnson would have offered, Donovine renewed his request to present Dr. Johnson's testimony at trial. (II:482). The court denied Donovine's request. (II:482).

On the fourth day of trial, Donovine filed an offer of proof setting forth Dr. Johnson's anticipated testimony and laying additional foundation for such testimony. (II:387-408). Based on the offer of proof, Donovine again, renewed his request to have Dr. Johnson testify and the court, again, denied that request. (II:486).

On January 13, 2017, the jury convicted Donovine of the crime of child abuse, neglect or endangerment with substantial bodily harm (a category B felony). (II:448). In a Judgment of Conviction filed on March 10, 2017, the district court sentenced Donovine to 36-120 months in the Nevada Department of Corrections. (II:449-50). Donovine's appeal was docketed in Nevada's Supreme Court on March 30, 2017. (II:455).

STATEMENT OF THE FACTS

On the morning of January 5, 2016, Donovine Mathews was at his girlfriend Jasmin Cathcart's apartment along with Jasmin and her two children: 2-year-old CJ and his 1-year-old sister, JJ. (V:1029-31).

Jasmin had an appointment at the apartment's main office at 9:00 a.m. and left her children with Donovine shortly before that appointment. (V:1017,1034). While Jasmin was gone, Donovine boiled some water in a pot on the stove and poured it into a black cup on the kitchen counter, intending to make some coffee. (V:1017;VII:1653-56). Donovine placed the mug in front of some cookies and candy that were sitting on the counter. (VII:1623-24,1657). Donovine then went into the bedroom to change JJ's diaper. (VII:1653,1656-57). While Donovine was checking JJ's diaper, he heard CJ screaming from the kitchen. (V:1017;VII:1653-54). When Donovine returned to the kitchen, he found CJ standing beside the spilled black cup, saying "It hot. My hand, my hand." (V:1017;VII:1653-54,1659,1670). Although Donovine did not see how the cup fell, CJ was tall enough to reach across the countertop on his tippy toes. (V:1072)

Donovine noticed that the backs of CJ's hands were burned and peeling, so he took CJ to the bathroom, removed his clothes, and put him in the bathtub with some cold water to cool off his hands. (VII:1654,1662,1670). Donovine called Jasmin and told her to come back to the apartment because CJ had "burned himself". (V:1036;VII:1654). While CJ cooled his hands in the tub, Donovine cleaned up the water in the kitchen and put the spilled cup in the sink. (VII:1670-72). Then, Donovine got CJ

out of the tub and put Neosporin on the backs of his hands. (VII:1625-28;1658). At some point, Donovine also put an ice pack on CJ's hands.[2] (State's Exhibit 2).

When Jasmin returned at around 9:23 a.m., Donovine told Jasmin what happened[3] and Jasmine examined the burns on the back of CJ's hands. (V:1039;1043-44). Jasmin decided they needed to go to the hospital. (V:1039-40). Sunrise Hospital was only a 5-10 minute walk from Jasmin's apartment, so they walked there, with Donovine carrying CJ and Jasmin pushing JJ in a stroller. (V:1039-41).

Dr. Elis Olson was CJ's treating physician at the hospital. (VI:1403-04). After examining CJ, Dr. Olson diagnosed him with a combination of first and second degree burns to his hands. (VI:1406). Dr. Olson found the burns "suspicious for abuse and neglect" because one hand showed a "clear demarcation line" and because the burn patterns were "matching or symmetric". (VI:1409). Dr. Olson believed the burns were likely "emersion" burns – meaning the hands had been immersed in water. (VI:1409,1411). As

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[2] Dr. Sandra Cetl confirmed that the blistering that later appeared on the backs of CJ's hands was the type that can occur when "something cold is applied right away. So cold water or something like that." (V:1151).

[3] Jasmine testified that Donovine told her he was making coffee and set a cup of hot water "on the counter, and he went to go change [JJ's] diaper, and when he was dealing with her, [CJ] started crying, and obviously the burns were there." (V:1043-44).

required by law, Dr. Olson reported the suspicious burns so the LVMPD could begin an investigation. (VI:1403).

Later that day, Detective Philip DePalma was assigned to investigate the cause of CJ's burns. (VI:1326). At the hospital, Donovine gave a voluntary statement to DePalma, explaining how he had boiled water for coffee, poured it in a cup on the counter, filled the cup 75% full, left the room to check on JJ, and returned to find CJ standing in the kitchen with burns on his hands and the cup on the floor. (VI:1332;VII:1644-85).

After the interview, Donovine agreed to accompany DePalma back to Jasmin's apartment where he voluntarily performed a videotaped re-enactment of the events leading up to and following CJ's accident in the kitchen. (VI:1337 and State's Exhibit 2). During the reenactment, Donovine showed DePalma the cup he had filled and where he placed it on the counter top. (VI:1342-45;VII:1639-40 and State's Exhibit 2). Police measured the height of the countertop. (VI:1349;VII:1621-22). Police measured the height and diameter of the black mug that Donovine identified, and the depth of the countertop. (VII:1629-38).

During the reenactment, it was apparent that DePalma did not believe Donovine's version of events. The cup identified by Donovine had a handle missing and food debris on the bottom. Donovine explained that he had

used the bottom of the cup to crush up chips to make a spread. (State's Exhibit 2). Then, Donovine was unable to locate any coffee in the cupboards. (State's Exhibit 2). As Donovine searched for the coffee canister, DePalma asked Donovine, "Alright, come on man, what were you really doing, then? If there was no coffee in there, you were boiling water..." (State's Exhibit 2). But Donovine swore up and down that he thought there was coffee in the house.[4] (State's Exhibit 2).

DePalma then enlisted the help of "burn expert" Phylip Peltier and "child abuse evaluator" Dr. Sandra Cetl to confirm his suspicions about the cause of CJ's injuries. (V:1137; VI:1365-66). After consulting both Peltier and Cetl, DePalma booked Donovine into CCDC on child abuse charges. (VI:1367). Peltier and Cetl eventually became star witnesses in the case against Donovine.

State's "Burn Expert" - Phylip Peltier

Peltier received his Associates Degree in Criminal Justice from Mesa College in San Diego in 1974. (I:117). He worked as a police officer from 1974 until 1987, and as a DA investigator from 1987 until he retired in 2003. (I:114;V:1233-34). Peltier currently teaches, consults and testifies in cases

[4] At trial, Jasmin testified that her father had taken the canister of coffee that he and Donovine shared, leaving only a small baggy of coffee behind. (V:1105-07). Jasmin later found that small baggy of coffee in the cupboard beneath the hot chocolate and Kool-Aid. (V:1105-07).

involving suspicious burn injuries based on a methodology that he developed while working in law enforcement. (I:114;VI:1272).

Peltier has no medical training. When the State asked Peltier about his training related to evaluating burn injuries, Peltier admitted "the training out there is essentially me. I've looked for specialized training. There really isn't any. Most of the training I've spoken to doctors and nurses, and they've told me about temperatures, there's been articles that I could read. When I've sought it out, it turns out that the presentations -- I am the presentation, with all due respect." (V:1226).

Peltier's methodology involves conducting "experiments" to recreate the injuries he saw in a given case. (VI:1272-73). Based on his methodology, Peltier claims he can tell whether an injury is intentional. (VI:1272).

Peltier is known as the "blue dye guy" because many of his experiments involve putting blue dye in water and spilling it on a subject to see what kind of pattern is left behind. (VI:1290). Peltier does not perform these experiments in a lab with scientific controls; rather, he will "try to recreate the injury in the photograph" and will call his client back and say, "here's what we found out, it's totally accidental, we're not sure, they could be strong enough to do it, there's no way or 100 percent non-accidental." (VI:1274).

At trial, Peltier explained his methodology:

> Just a three dollar package of Rit, either liquid or power, I stir it up. My student leave with blue hands, the doctors leave with blue hands because I make the students, the doctors, nurses, one time a judge; in my class, they have to make their hands look like the victim's in the photos.

(VI:1291).

Peltier teaches his students that "anyone" can use his blue dye method to recreate a burn pattern. (VI:1294). "I tell them in the class the advantage of this is, besides being inexpensive is $3, anybody can use it, and medical, defense, everybody's used it to recreate, is that it takes a couple days to come off so it can be videotaped, it can be photographed." (VI:1294).

Unfortunately, in Peltier's field there are no "peers" to review his work because he is literally "the only person doing this type of burn stuff". (VI:1274). Naturally, Peltier testified that he can be 100% sure of his findings. (VI:1293).

When consulted in this case, Peltier *did not* perform any recreation experiments, nor did he examine CJ in person. (IV:1281,1291). His opinions at trial were based solely on his review of the photographs of CJ's injuries, information from the arrest report, and Donovine's voluntary statement. (IV:1279-80).

Peltier disagreed with CJ's treating physician that the burns were emersion burns. (VI:1255-56). Based on a photograph of the back of CJ's right hand, Peltier testified that the "burn seems to initiate just below the wrist near the thumb" and "flows toward the knuckles." (V:1248; State's Exhibit 8). Based on a photograph of CJ's left hand, Peltier testified that the water appeared to have settled at the wrist area and that the fingers were likely raised. (VI:1254).

From the photographs, Peltier concluded that CJ's hands "were in two completely different positions" and were not restrained by a caretaker during the incident. (VI:1252, 1254, 1258). Peltier concluded that "this appears to be a very careful slow, deliberate pour" of extremely hot water "very close to the hand". (VI:1262;1289). Peltier testified that Donovine could have held CJ's hands right under the faucet and turned the hot water on "very slow", though he admittedly knew nothing about the water pressure in the house. (VI:1270).

Although Peltier had not performed any recreations in this case and did not have a background in biomechanics, the court allowed Peltier to evaluate several hypothetical mechanisms that could have resulted in accidental burns to CJ's hands and explain why each of those mechanisms was unlikely or impossible. (VI:1263-1271,1275). Peltier claimed that he

"considered all of the possibilities" and could not "conceive of any way [CJ] would have been able to move that cup to self-inflict those burn patterns." (VI:1288,1301). Peltier ultimately concluded that the liquid "wasn't tipped over by [CJ]. It was done by someone else." (VI:1301).

State's "Child Abuse" Expert – Sandra Cetl

Cetl graduated from the University of Vermont College of Medicine in 2007 and completed her residency in pediatrics at UNLV in 2010. (I:102). Since 2010, she has worked at Sunrise Hospital as a child abuse pediatrician. (I:102).

At trial, Cetl claimed she never examined CJ personally, and that her opinions were solely based on her review of photographs, medical records, and a brief consultation with CJ's treating physician. (V:1142,1178).

Cetl testified that Donovine's version of events was "inconsistent" with the burn patterns she saw on CJ's hands. (V:1162-63). Cetl testified that if CJ had accidentally pulled a cup of water down from above, she would expect to see "pooling" in CJ's tee shirt (which they did not find), along with burns on CJ's forearms and shoulders, and not just on the backs of his hands. (V:1173). If the burns had occurred accidentally, Cetl would also expect to see more splash marks than appeared in the photographs, and she would expect to see burns on CJ's "exploratory areas" like the palms of

his hands. (V:1163-65,1169). However, the palms of CJ's hands were "spared". (V:1164-65). Based on the burns' "uniform" appearance, Cetl opined that CJ was unable to reflexively pull away from the water; unlike Peltier, Cetl believed that CJ's hands had been restrained. (V:1166).

Although Cetl had no background in biomechanics and had performed no recreation experiments in this case, the court also permitted Cetl to opine about a number of hypothetical mechanisms that could have caused accidental burns and assert why each of those mechanisms was unlikely or impossible. (V:1179-86). Cetl testified that having accidental bilateral burns on the backs of both hands was "as next to impossible as it comes." (V:1171).

Donovine's Expert – Dr. Lindsey "Dutch" Johnson

In order to establish his defense theory and refute the State's experts, Donovine retained biomechanics expert Lindsey "Dutch" Johnson, PhD, to identify a possible mechanism whereby CJ could have accidentally burned the backs of his own hands. (II:363-64,366).

Dr. Johnson was eminently qualified to render an expert opinion in this case. Dr. Johnson received his PhD in mechanical engineering and biomechanics from Georgia Institute of Technology in 1998, his MS in mechanical engineering and biomechanics from Oregon State University in

1992, and a BS in mechanical engineering from Oregon State University in 1990. (I:204). Dr. Johnson specializes in the biomechanics of human injury and has 15 years of forensic reconstruction experience, as well as 8 years of scientific research experience in human soft tissue mechanics and human impact force mechanics.(I:203;II:264). Dr. Johnson has extensive experience with skin injury patterns, including those associated with "bruises, abrasions, scratches, lacerations, cuts as well as burns on human skin". (IV:920). As a biomechanics expert, he worked on 3-4 other cases involving liquid burns. (IV:923-24). Dr. Johnson is a licensed private investigator in the state of Arizona where he maintains his business, Wiltshire Forensic Biomechanics, LLC. (I:204).

Based on the available data,[5] Dr. Johnson hypothesized that CJ's burn patterns were caused either by a spill from left-to-right, or from right-to-left, that occurred when CJ reached over the counter and tipped the mug over. (II:376;IV:936-37). To test his hypothesis, Dr. Johnson conducted a number of scientifically controlled experiments using a total of three toddlers (two for the preliminary experiments, and one surrogate for the final experiment), a counter top of the same height as the subject counter top, and an exemplar

[5] This data included the subject counter height, the subject mug dimensions and manufacturer, the water level within the mug, the location of the mug on the counter, CJ's height and hand size, and the burn patterns on CJ's hands as depicted in photographs. (I:376-77;IV:925-28).

mug[6] filled with cool water to the level indicated by Donovine in his voluntary statement. (II:376). Dr. Johnson conducted preliminary experiments to vary the unknowns, such as the toddler's hand positions relative to one another, the mug position relative to the toddler's hand, and mug tipping force, in such a way that would result in a spill pattern similar to the burn patterns seen on the backs of CJ's hands. (II:376). After identifying the relationships between these unknowns, Dr. Johnson conducted a final experiment using a surrogate toddler with the same approximate hand size and height as CJ, which resulted in a spill pattern across the backs of his hands very similar to the burn patterns seen on CJ's hands in the photographs. (II:376).[7] Dr. Johnson's experiments were controlled by known standards and had numerical error rates associated with each measurement. (II:381-84).

Based on his experiments, Dr. Johnson concluded that the burns sustained to the backs of CJ's hands were "consistent with the subject mug of hot water being initially located on the counter top to the left of his hands,

[6] The mug was a replica of the same make/model identified by Donovine in the reenactment video and photographed by the LVMPD. (IV:928).

[7] Dr. Johnson also conducted a single experiment to determine how fast a toddler CJ's size and age could turn and run for 4 feet, and a single experiment to determine how far a toddler of CJ's same height and hand size could reach from the edge of a counter the same height as the subject counter. (II:377).

and then spilling from left to right over both of his hands." (II:357;IV:936-37). Dr. Johnson further concluded that the burns were "consistent with [CJ] reaching over the counter, and at some point, making downward contact with the rim of the mug with the left side of his left palm/finger causing the mug to tip from left to right and spill water over his hands." (II:357;IV:936-37). This mechanism explained the sparing on the palms of CJ's hands and was consistent with the physical evidence. (II:359). See also (II:287-360) (Power point Presentation) and (II:389-407) (Offer of Proof). Dr. Johnson would have testified to a reasonable degree of certainty that CJ's injuries could have occurred in this manner. (IV:937).

Despite the clear scientific basis for his opinions, the court ruled that Dr. Johnson's testimony lacked "foundation". Unable to refute the State's experts, Donovine was convicted of child abuse with substantial bodily harm and sentenced to 3-10 years in the Nevada Department of Corrections.

SUMMARY OF THE ARGUMENT

Donovine Mathews sits in prison today for one simple reason: because the district court would not allow him to properly defend himself at trial. The court would not allow him to present admissible expert testimony to refute the State's expert witnesses. The court would not allow him to cross-examine the State's experts, and other witnesses, to advance his theory

of the case. The court denied him a jury instruction on his theory of the case. And the court would not even allow him to argue his theory of the case in closing. The reasons given by the court to justify its draconian rulings do not hold up under scrutiny. The court applied one standard to Donovine, and another more lenient standard to the State. The court's clear bias against Donovine, and its application of double standards throughout the proceedings, denied Donovine equal protection under the laws. Whether considered alone or together, the serious constitutional errors in this case require reversal and a new trial in front of a new tribunal.

ARGUMENT

I. The district court abused its discretion with respect to expert testimony.

Donovine's state and federal constitutional rights to due process and a fair trial and his right to present a defense were violated when the district court improperly excluded Dr. Johnson's expert testimony while permitting the State's experts to eviscerate his defense. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 8.**

This Court reviews district court decisions concerning the admissibility of expert testimony for an abuse of discretion. **Hallmark v. Eldridge**, 124 Nev. 482, 498 (2008); **Higgs v. State**, 125 Nev. 1043, 20 (2010) (applying the **Hallmark** factors in a criminal case). A district court

abuses its discretion when its factual findings are not supported by substantial evidence in the record. See **Wyman v. State**, 125 Nev. 592, 605 (2009). A district court also abuses its discretion when it applies evidentiary rules in a manner that "defeat[s] the ends of justice." **Chambers v. Mississippi**, 410 U.S. 284, 302-03 (1973); **Holmes v. South Carolina**, 547 U.S. 319, 324-26 (2006).

In this case, the district court abused its discretion with respect to expert testimony because: (a) Dr. Johnson's testimony was admissible; (b) the court applied a double standard to improperly exclude Dr. Johnson's testimony; (c) the court's findings were not supported by substantial evidence in the record; and (d) Dr. Johnson's testimony was essential to Donovine's defense and its exclusion violated his constitutional rights.

a. Dr. Johnson's testimony was admissible under NRS 50.275.

Pursuant to **NRS 50.275**, an expert witness must satisfy three primary requirements to testify at trial:

> (1) He or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark, 124 Nev. at 498 (quoting **NRS 50.275**) (emphasis added). Dr. Johnson satisfied all three requirements.

i. The qualification requirement.

Like the biomechanics expert at issue in **Hallmark**, Dr. Johnson was qualified in an area of "scientific, technical or other specialized knowledge." **NRS 50.275**. When evaluating the "qualification requirement", district courts should consider the following non-exhaustive factors (which may, or may not be applicable in every case): "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." **Hallmark**, 124 Nev. at 499 (footnotes omitted).

Dr. Johnson's PhD in mechanical engineering (biomechanics) along with his masters and bachelors of science degrees in the same subject matter satisfied the formal schooling and academic degrees factor. (I:204). Dr. Johnson's private investigator license satisfied the licensure factor. (I:204). Dr. Johnson's fifteen years of forensic reconstruction experience and eight years of scientific research experience in human soft tissue mechanics and human impact force mechanics satisfied the employment and specialized training factors. (I:203). Without question, he was qualified.

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ii. The assistance requirement.

Unlike the biomechanics expert at issue in **Hallmark**, Dr. Johnson's expertise would have assisted "the trier of fact to understand the evidence or to determine a fact in issue." **NRS 50.275.** To satisfy the "assistance requirement", an expert's opinion must be both "relevant and the product of a reliable methodology." **Hallmark**, 124 Nev. at 500.

Dr. Johnson's testimony was certainly relevant.[8] The State's experts testified that there was *no possible way* that CJ could have burned the backs of both hands accidentally, given the information that Donovine provided to police. (V:1171;VI;1301). Dr. Johnson's testimony would have refuted that claim. His experiments, which were based on the very same information relied on by the State's experts, showed that it *was possible* for CJ to have caused a mug of hot water to spill over the backs of his hands. (IV:939-40). That is the textbook definition of relevant evidence. See **NRS 48.015.**

Dr. Johnson's testimony was also the product of a reliable methodology. When determining if an expert's opinion is based on a reliable methodology, district courts should consider the following non-exhaustive factors (which may or may not be applicable in every case):

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[8] Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." **NRS 48.015.**

> whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture or generalization. IF THE EXPERT FORMED his or her opinion based on the results of a technique, experiment or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute.

Hallmark, 124 Nev. at 500-501(footnotes omitted).

Unlike the appellee in **Hallmark**, 124 Nev. at 502, Donovine presented evidence to the district court that biomechanics was within a recognized field of expertise. (II:365;377-78). The court agreed, telling the parties, "I know what biomechanical experts are. I know what they can testify to." (IV:909).

Unlike the expert at issue in **Hallmark**, 124 Nev. at 502, Dr. Johnson's opinion was both testable *and* tested. Dr. Johnson's opinion was based on experiments that he developed for purposes of *this case*, and that were controlled by known standards, with a known error rate, and with conditions similar to the conditions known at the time of the incident. (II:379-384). C.f. **Hallmark**, 124 Nev. at 500-502 ("Tradewinds did not introduce any evidence that Dr. Bowles attempted to re-create the collision

by performing an experiment . . . [n]or was any evidence proffered showing that Dr. Bowles' opinion was formed and controlled by known standards or had a known error rate").

Importantly, the court agreed that Dr. Johnson's experiments involved conditions that were similar to those at the time of the incident:

- "what he's saying I'm sure is all accurate, his assumptions are all accurate." (IV:953)
- "he has a factual basis for a mug of hot water on a countertop, I agree with all of the measurements. That all seems to be accurate." (IV:953).
- "I'm with you all the way up to the countertop, the height, even the size of the child's hands I'm with you, because apparently they appear to be estimated based on at least some sort of measurement guide. . . ." (IV:959-60).[9]

In addition, testimony by the State's own expert, Peltier, established that burn pattern recreation experiments were "generally accepted" in the scientific community. (V:1231-32).[10] In fact, Peltier testified that *anyone*

[9] This factual finding is entitled to deference by this Court. See, e.g., **Wrenn v. State**, 89 Nev. 71 (1973) (whether substantial similarity exists between conditions of out-of-court experiment and incident in issue normally is a discretionary decision for the trial judge to make).

[10] C.f. **Hallmark**, 124 Nev. at 502 ("Tradewinds also did not offer any evidence showing that these types of opinions were generally accepted in the scientific community").

could recreate a liquid burn pattern by using cool water and Rit dye.[11] (VI:1294). Dr. Johnson's recreation method was similar to the one advocated by Peltier, minus the blue dye. (VI:1304). Yet, Dr. Johnson's method was arguably *superior* to Peltier's, since Peltier admitted he does not use *any* scientific controls in his own experiments. (VI:1274).

Unlike the biomechanics expert in **Hallmark** (who never attempted *any* recreation experiments), Dr. Johnson offered an experimentally-tested scientific opinion that was based on the particularized facts of this case. (I:376-77;IV:925-28). Without question, Dr. Johnson's testimony satisfied the "assistance requirement" in this case.[12]

iii. The limited scope requirement.

As a biomechanics expert and forensic reconstructionist with personal knowledge of the experiments that he conducted in this case, Dr. Johnson's opinion that CJ could have burned himself by reaching over the countertop and tipping the mug onto his hands was clearly within the scope of his specialized knowledge. (II:384-85).

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[11] Peltier admitted he is the only burn expert in the world who does what he does, so his testimony about the acceptability of burn pattern recreation experiments carry significant weight in this case. (V:1226;VI:1274).

[12] Because Dr. Johnson's opinion was specific to this case and was not published, the peer review factor is not relevant here. See, **Hallmark**, 124 Nev. at 502.

b. The district court applied a double standard to improperly exclude Dr. Johnson's testimony.

Although Dr. Johnson's testimony was admissible under **NRS 50.275**, the district court excluded his testimony for other reasons. Claiming that Dr. Johnson's testimony lacked "foundation", the court would not allow Dr. Johnson to testify that CJ could have reached over the countertop and tipped the mug onto his hands because no one saw him do it:

- "But your client didn't say this is how it happened. It would be one thing if your client was going to testify and say the child had his hands on the counter, the child tipped the – the mug. You want to bring someone in here to create a completely – a factual scenario and put it off in front of the jury as though that's what happened." (IV:948)

- "there has to be a factual foundation. So there's nobody to testify to that set of facts." (IV:946).

- "You have to have the foundation in order for the expert to testify about that. And no one's going to testify that that's what happened, right?" (IV:965)

- "what [Dr. Johnson is] saying I'm sure is all accurate, his assumptions are all accurate. The only problem is he is creating a factual scenario. He's creating it from nothing. We don't do that in – court cases. We don't do that. You have to lay a foundation." (IV:953)

When defense counsel pointed out that Dr. Johnson was merely going to testify that CJ *could have* injured himself in that manner, the court made up its mind to exclude Dr. Johnson at trial:

> Okay. If he's just going to say this is what could have happened, then right there, that's easy, because we don't bring experts in to tell a jury every possible thing that could have happened.

(IV:953-54). In deciding to exclude Dr. Johnson's testimony, the court repeatedly took issue with the defense's intention to tell the jury about what "could have happened." See, e.g., (IV:938) ("Yeah, but experts can't just come in here and tell this jury based on all this, this possibly could have happened"); (IV:940-41) ("we don't bring experts in here to tell a jury what could have happened, okay?"); (IV:964) ("but it appears as though the main thing is he wants to testify about a scenario that he says could have happened").

But then, after preventing Dr. Johnson from testifying about what "could have happened", the court inexplicably allowed the State's expert Peltier to opine that Donovine *could have* held CJ's hands under a faucet to cause the burns.(VI:1270). If Dr. Johnson's opinions lacked "foundation" because there was no percipient witness to attest to them, then Peltier's opinion also lacked foundation for the very same reason.

Throughout trial, the court made similar contradictory rulings that benefited the State and harmed the defense. Over the defense's foundational objections, the court allowed both Cetl and Peltier to evaluate hypothetical accidental ways that CJ could have burned himself and explain why each of

those mechanisms was impossible in this case. (V:1171,1179-86,1192-95;VI:1263-71,1275,1301).

Although Cetl was a medical doctor with no experience in injury biomechanics who had performed no recreation experiments in this case, the court allowed her to render an opinion excluding the very mechanism of injury proposed by the defense. (V:1183-84). Cetl testified that for a cup of water to land "on the backs of both hands" would be "near impossible without some kind of mechanism in order to knock that cup down" and that the mechanism would have to be something other than the child's hands pushing the cup over. (V:1183-84).

Likewise, even though Peltier admitted he would "have to do an exact mannequin recreation" to be sure, the court allowed Peltier to testify about the burn patterns he would "expect to see" if CJ were burned by liquid after placing his hands on a countertop. (VI:1266-67). Peltier later claimed that CJ could not possibly have tipped the cup over and burned himself. (VI:1300-01).[13]

[13] Peltier's testimony was also cumulative of testimony already given by Cetl and unfairly bolstered her expert opinions. (V:1221). **Vallery v. State**, 118 Nev. 357, 372 (2002) (cumulative testimony may be properly excluded); **Felix v. State**, 109 Nev. 151, 203 (1993) (cumulative hearsay testimony unfairly vouched for victim's testimony), superceded on other grounds by statute, as stated in **Evans v. State**, 117 Nev. 609 (2001).

Such opinions fell within the purview of injury biomechanics: applying mechanical engineering principals to human injury in order to identify the mechanisms that caused tissue damage. (II:295-304). While Cetl and Peltier's highly speculative opinions on injury biomechanics should have been excluded for lack of foundation under **Hallmark**, 124 Nev. at 502, the court allowed the jury to hear those opinions and then prevented Dr. Johnson from refuting them. (V:1188-95;VI:1303-09).

In his dissent to **Richmond Med. Ctr. For Women v. Herring**, 527 F.3d 128, 167 (4th Cir. 2008), reversed on reh'g en banc, 570 F.3d 165 (4th Cir. 2009),[14] Fourth Circuit Judge Paul Niemeyer explained that such contradictory rulings on the admissibility of expert opinion testimony are an abuse of discretion:

> the district court supported its decision to strike the testimony of Dr. Giles by noting that Dr. Giles could not point to any medical literature to support his theory that cervical muscle relaxants could be used to dislodge a fetal head that had become lodged during a standard D & E procedure. Disqualifying Dr. Giles on this basis is particularly troubling because Dr. Fitzhugh's experts similarly failed to support several of their opinions with documented medical authority, yet the court chose to rely on them. The court's rejection of Dr. Giles' testimony for that reason created a double standard and was an abuse of discretion.

[14] Judge Niemeyer's dissent in **Herring** remains persuasive since he authored the *en banc* decision that overruled **Herring**.

By holding Donovine's expert to a different foundational standard than it applied to the State's experts, and by using that standard as a basis to exclude Dr. Johnson's testimony from trial, the court abused its discretion in this case. See **Herring**, 527 F.3d at 167 (Niemeyer, dissenting).

c. The district court's ruling was not supported by substantial evidence.

The district court also ruled that, as a biomechanics expert, Dr. Johnson was not "competent" to testify about burn patterns on skin. (IV:975-76) ("I mean, I don't think that taking an anatomy class and, you know, his first aid training in the Marines allows him to testify about the different burn patterns on a child's skin"); (VI:1306) ("He's not competent to testify about burn patterns. He's a biomechanical expert."). However, these findings were not supported by substantial evidence in the record. See, e.g., **Wyman**, 125 Nev. at 605 (abuse of discretion if court's findings are not supported by substantial evidence).

First, Dr. Johnson's education was not limited to "first aid training in the Marines" and "an anatomy class". While he *did* receive first aid training in the Marines (II:374), Dr. Johnson's PhD coursework in bioengineering involved extensive study of the human body, how it functions, and how different forces affected it. (II:371). Dr. Johnson took courses on anatomy pathophysiology and layers of the skin. (II:371;IV:920-22). He worked in

the laboratory at Emory University Medical School. (IV:920-21). Then, Dr. Johnson spent six years working in the Georgia Tech biomechanics laboratory, examining vascular tissue, skin tissue, and the layers within those soft tissues. (IV:922).

Second, the court was wrong to deem biomechanical experts incompetent to testify about burn patterns. As a biomechanics expert, Dr. Johnson's entire job is to investigate, analyze and reconstruct injuries in adults and children. (IV:915). Dr. Johnson had prior experience investigating liquid burns. (IV:923-24). For the past five years, the majority of Dr. Johnson's cases have involved investigating patterns on human skin: patterns associated with bruises, abrasions, scratches, lacerations, cuts as well as burns. (IV:919-20). Where Dr. Johnson applied his biomechanical expertise to investigate the source of CJ's burn patterns in this case, he was certainly competent to testify about the patterns that he found.

Finally, "burn expert" Peltier testified that "anyone" could recreate a burn pattern for investigative purposes – no medical expertise necessary. (VI:1294). Peltier had no medical background and his only "training" consisted of speaking to doctors and nurses, reading articles, and performing his own non-scientific experiments. (V:1226,1232). Where the uncontroverted evidence established that "anyone" could recreate a burn

pattern, and where Peltier testified about burn patterns without any medical background, it was an abuse of discretion to exclude Dr. Johnson's testimony at trial. See **Wyman**, 125 Nev. at 605; **Herring**, 527 F.3d at 167 (Niemeyer, dissenting).

d. Dr. Johnson's testimony was essential to Donovine's defense and its exclusion violated his constitutional rights.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" **Crane v. Kentucky**, 476 U.S. 683, 690 (quoting **California v. Trombetta**, 467 U.S. 479, 485 (1984)). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" **Holmes v. South Carolina**, 457 U.S. 319, 324-25 (2006) (quoting **United States v. Scheffer**, 523 U.S. 303, 308 (1998) (quotation omitted)). The Constitution thus "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." **Holmes**, 547 U.S. at 326.

In **Williams v. State**, 110 Nev. 1182, 1185 (1994), the Nevada Supreme Court applied these constitutional principals in the context of

expert testimony, reversing an appellant's conviction where the district court improperly excluded expert psychiatric testimony that would have strengthened the appellant's insanity defense.

As in **Williams**, the district court had no legitimate basis to exclude expert testimony that was essential to Donovine's theory of the case. The State's experts testified that there was no possible way CJ could have injured himself accidentally. (V:1171,1179-86,1192-95;VI:1263-71,1275,1301). The only way to refute that testimony was to identify a possible way that CJ could have injured his own hands. (V:1189-95; IV:1303-05). Dr. Johnson established that it was biomechanically possible for CJ to have tipped the mug sideways, spilling hot water over the backs of his hands; yet, the court would not allow him to testify. (V:1195; VI:1309).

By preventing Donovine from presenting admissible expert testimony that would have supported his theory of the case, the district court violated Donovine's constitutional rights. See, e.g., **Williams**, 110 Nev. at 1185; **Marvelle v. State**, 114 Nev. 921, 931 (1998) ("Marvelle was denied a fair trial because he was denied the opportunity to oppose the State's case by means of his own expert testimony"), abrogated on other grounds by **Koerschner v. State**, 116 Nev. 1111 (2000); **State v. St. George**, 252

Wis.2d 499 (Wis. 2002) (reversing conviction where district court improperly excluded expert testimony). Donovine is entitled to a new trial.

II. The district court abused its discretion with respect to reciprocal discovery.

The district court violated Donovine's due process and fair trial rights by forcing him to disclose evidence that he did not intend to introduce in his case in chief, while refusing to order the State to produce reciprocal discovery to which Donovine was entitled. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 8; Art. IV, Sec. 21.**

This Court "review[s] the district court's resolution of discovery disputes for an abuse of discretion. [It] also reviews a district court's decision to admit or exclude evidence at hearings and trials for an abuse of discretion." **Means v. State**, 120 Nev. 1001, 1007–08 (2004) (footnotes omitted). It is an abuse of discretion for a district court to deny a defendant discovery to which he is entitled by law. **Id.** at 1008 (district court abused its discretion when it denied appellant's right, pursuant to **NRS 50.125(1)(b)**, to inspect a writing used to refresh a witness's recollection).

In **Wardius v.Oregon**, 412 U.S. 470, 472 (1970), the U.S. Supreme Court held that the Fourteenth Amendment's Due Process Clause forbids the enforcement of discovery rules unless reciprocal discovery rights are given to criminal defendants. As the Court explained:

> [W]e do hold that in the absence of a strong showing of state interests to the contrary, *discovery must be a two-way street.* The State may not insist that trials be run as a 'search for the truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. *It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state.*

Wardius, 412 U.S. at 475-76 (emphasis added). Under **Wardius**, a criminal defendant is entitled to at least as much discovery *from* the State as he is required to disclose *to* the State.

At the same time, however, the Fifth Amendment protects a criminal defendant from having to disclose evidence that he does not intend to present at trial. **Binegar v. Eighth Jud. Dist. Ct.**, 112 Nev. 544 (1996). In **Binegar**, the Nevada Supreme Court invalidated a prior version of Nevada's discovery statute because it violated the Fifth Amendment. As the Court explained:

> Under **NRS 174.235(2)**, the defendant would be forced to disclose witness statements and the results or reports of mental and physical examinations and scientific tests or experiments, *even if the defendant never intended to introduce the statements or materials at trial.* In such circumstances the defendant would be compelled to do more than simply accelerate the timing of intended disclosures of materials; *the defendant would be forced to disclose information that he never intended to disclose at trial, some of which could be self-incriminating.* Such a situation would violate a defendant's constitutional guaranties against self-incrimination.

124 Nev. at 551 (emphasis added).

As a result of this Court's ruling in **Binegar**, the discovery statute was modified so that criminal defendants now need only disclose "[r]esults or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant . . ." **NRS 174.245** (emphasis added).

a. Expert Discovery

In this case, the district court violated Donovine's Fifth and Fourteenth Amendment rights under **Wardius** and **Binegar** by refusing to order the State to comply with its reciprocal discovery obligations, while forcing Donovine to disclose evidence that he did not intend to introduce in his case in chief.

Prior to trial, Donovine filed a discovery motion seeking, among other things, "any and all notes and reports of any expert in the case." (I:137-165). Donovine requested those materials pursuant to **NRS 174.235(1)(a)**, which required the State to disclose "any written or recorded statements by a witness the prosecuting attorney intends to call during the case in chief of the State", and pursuant to **NRS 174.234(2)(c)**, which required the State to disclose "[a] copy of all reports made by or at the direction of the expert witness" no less than 21 days prior to trial.

Without question, Donovine was entitled to any "notes and reports" of the State's testifying experts prior to trial. However, when the State opposed Donovine's request and claimed that its experts only relied on "photographs and medical records" to render their opinions (II:512), the court ruled that the State only needed to disclose "photographs and medical records" – *no notes*. (Compare I:158 with II:236; III:511-12). By ordering the State to produce less than was required by statute, the court abused its discretion. See **Means**, 120 Nev. at 1008.

Meanwhile, the State's discovery motion asked Donovine to disclose "copies of all reports, tests, videos, photographs or *any other item or items prepared by or produced from any noticed defense expert witness*". (I:197) (emphasis added). That request was overbroad. Donovine was only required to turn over the expert materials specifically identified in **NRS 174.234(2)(b)**,[15] and anything else that he intended to introduce in evidence during his case in chief. (III:547-48;566-67). See also **NRS 174.245(1)(b)**; **Binegar**, 112 Nev. at 551. Donovine complied with the statute, timely

[15] This includes a "written notice containing: (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony; (b) A copy of the curriculum vitae of the expert witness; and (c) A copy of all reports made by or at the direction of the expert witness. **NRS 174.234(2)**.

disclosing all photographs and materials that he intended to introduce via Dr. Johnson in his case-in-chief. (III:547-49).

Yet, the court ordered Donovine to disclose "copies of all reports, tests, videos, photographs or any other item or items prepared by or produced from any noticed defense expert witness", *regardless of whether the defense intended to present those materials at trial.* (I:197; III:568). The court required Donovine to turn over those materials prior to trial or else it would exclude Dr. Johnson from testifying. (III:568) ("You're not permitted to have your expert do all these things: take notes, do calculations, create videos, and then say, it's not a report, so we're not going to turn it over. . . if you want your expert to testify, comply with the rules.").

Then, over Donovine's objection, the court granted the State an unnecessary three-month continuance to review those materials. (III:571). The materials included Dr. Johnson's handwritten notes (just 1/2 page of mathematical calculations), five short videos[16] (totaling 26 seconds in

[16] Most videos were 2-3 seconds in length, with the longest being 11 seconds. (III:549,552). Dr. Johnson recorded the videos to obtain still photographs to show the flow of water over the subject's hands. (III:549). Donovine had timely disclosed all still photographs that he intended to use at trial . (III:550). Five days before trial, Donovine discovered and obtained the videos and ½ page of handwritten notes and provided them to the State. (III:550-55). There was no need for a continuance to review the brief videos, because the still photographs already showed the substance of those very brief videos. (III:552).

length), and an incomplete PowerPoint presentation that Dr. Johnson had begun preparing on his own, without defense counsel's knowledge, and that defense counsel did not even *know* if it would use at trial. (III:551-58).

Yet, discovery was *not* a "two way street" in this case. After threatening to exclude Donovine's expert as a pretrial discovery sanction, the court refused to sanction the State in any manner when it revealed – *on the third day of trial* – that it had withheld its own expert's "case review" notes. (V:1212-20).

Hours before Peltier was set to testify, the State turned over three pages of Peltier's handwritten notes which set forth the basis for Peltier's expert opinion. (VII:1641-43). Donovine explained that the late disclosure was effectively a "trial by ambush", that he could not effectively cross-examine Peltier, and that his due process and fair trial rights, along with his right to effective assistance of counsel had been violated. (V:1215). Donovine requested three alternative remedies: a mistrial, the exclusion of Peltier as a witness, or permission to have Dr. Johnson testify in rebuttal. (V:1219). Donovine even reminded the court that it had granted the State a continuance under similar circumstances. (V:1215).

Yet, the court denied Donovine <u>any</u> relief. (V:1220). The court reiterated its prior ruling that the State's expert's notes "don't have to be

turned over."(V:1213). And although Peltier's notes contained his observations and conclusions, the court ruled that the notes were not a "report" and that the State had fully complied with discovery. (V:1220).

Of course, this ruling contradicted the court's prior order that Dr. Johnson's notes, calculations and videos were part-and-parcel of a "report" that had to be turned over. (III:568) ("You're not permitted to have your expert . . . take notes, do calculations, create videos, and then say, it's not a report so we're not going to turn it over.").

As the Supreme Court said in **Wardius**, 412 U.S. at 476, "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence he disclosed to the state." The district court's refusal to enforce the State's reciprocal discovery obligations while compelling Donovine to produce more than he was required to by statute violated Donovine's due process and fair trial rights and requires reversal.

b. Jail Calls

For similar reasons, the district court abused its discretion by allowing the State to introduce the contents of Donovine's jail calls into evidence, where those jail calls had been requested *and ordered* to be produced but

were not turned over by the State until after calendar call. (I:154-55,235;VI:1430-31). Cf. **NRS. 174.285**. Over defense objection, the court allowed Detective DePalma to testify about the contents of jail calls between Donovine and Jasmin where Jasmin expressed concern about "losing her ... children to CPS if she kept contact with Donovine". (VI:1434). The court also allowed DePalma to tell the jury that Donovine was "irritated" on one of the jail calls and told Jasmin, "Is that Jordyn? Tell her to shut her ass up, fuck." (VI:1434,1437).

The State improperly used this testimony to "impeach" its own witness, Jasmin Cathcart, on collateral issues where Donovine had not opened the door to those lines of inquiry. (VI:1426-28). See **Lobato v. State**, 120 Nev. 512, 518-521 (2004) ("Impeachment by use of extrinsic evidence is prohibited when collateral to the proceedings").

First, Jasmin had already admitted that CPS told her not to talk to Donovine and that she had done it anyway, so the testimony was unnecessary and cumulative. (VI:1426-28). Second, whether or not Jasmin heard Donovine say "shut her ass up" on a phone call was a collateral matter, and Donovine properly objected both to the State's initial questioning of Jasmin about the statement, along with the State's improper impeachment. (V:1087-89;1095,1120-21;VI:1431). See **Perez v. State**, No.

65221, 2014 WL 7277522, at *2 (Nev. Dec. 19, 2014) (unpublished) ("district court abused its discretion by allowing the State to present rebuttal evidence regarding [a] collateral matter"). The court should not have allowed the State to use untimely-disclosed jail calls to sandbag the defense in this manner.

III. The district court unfairly restricted Donovine's right of cross-examination.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..." **U.S.C.A. VI, XIV**; see also **Pointer v. Texas**, 380 U.S. 400, 403 (1965) (holding that the Confrontation Clause applies to the States through the Fourteenth Amendment).

The right to discredit a witness through cross-examination is of constitutional dimension and courts should hesitate to circumscribe that right. **Davis v. Alaska**, 415 U.S. 308, 316 (1974). A cross-examiner may properly "delve into the witness' story to test the witness' perceptions and memory, [and] . . . has traditionally been allowed to impeach, i.e., discredit the witness." **Id.** at 316. Cross-examination should not be restricted unless the inquiries are "'repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.'" **Lobato v. State**, 120 Nev. 512, 520 (2004) (quoting **Bushnell v. State**, 95 Nev. 570, 573 (1979)).

When a court prohibits a criminal defendant from "engaging in otherwise appropriate cross-examination", it violates the Confrontation Clause. **Delaware v. Van Arsdall**, 475 U.S. 673, 680 (citing **Davis**, 415 U.S. at 318).

This Court undertakes a *de novo* review of allegations that a defendant was denied an effective opportunity for cross-examination in violation of the Confrontation Clause. **Chavez v. State**, 125 Nev. 328, 338-339 (2009). In this case, the district court violated Donovine's federal and state Confrontation Clause and due process rights by improperly limiting his cross-examination of the State's three experts (Cetl, Olson and Peltier), preventing cross-examination related to prejudicial photographs, and limiting cross examination of Jasmin Cathcart. **U.S.C.A. V, VI, XIV and Nev. Const. Art. 1, Sect. 8.**[17]

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[17] Not only did these rulings violate Donovine's Confrontation Clause rights, they deprived him of the right to present a full defense. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." **Chambers**, 410 U.S. at 294. Donovine had the right "to defend against the State's accusations", and the right to a meaningful opportunity to present a complete defense. **Crane**, 476 U.S. at 690. The district court's refusal to allow the defense to sufficiently explore the areas of inquiry set forth herein also violated Donovine's fair trial and due process rights requiring reversal. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8.**

a. Cross-examination of Cetl.

The district court drastically restricted Donovine's ability to challenge Cetl's "scientific" opinions in this case. When Donovine asked Cetl if her assessment process involved the scientific method, the State objected based on relevance and the court sustained the objection. (V:1458-59). When Donovine asked Cetl if she would begin with an "assumption" or "hypothesis", the State objected and the court sustained. (VI:1460). When Donovine asked Cetl to break down the steps she would take to find out how an injury could have happened, the State objected and asked to approach. (VI:1461).

At the bench, Donovine explained that, since the court had excluded his defense expert, he needed to be able to challenge Cetl's medical and scientific testimony, and to do that, he had to get into Cetl's analysis in general and her analysis in this case in particular. (VI:1461). In response, the court said it would not "allow you to pretend like you have Dr. Johnson up on the stand . . . [and] get her to testify that she can create some sort of scenario in which this is [accidental]." (VI:1462). The court reiterated, "You're permitted to challenge her, but she's here, not somebody else." (VI:1462). With that, the court ruled that Donovine could not develop his theory of the case on cross-examination using the State's witness.

Indeed, after allowing Cetl to testify on direct examination that Donovine's proposed accidental mechanism of injury was "near impossible" based on what she understood about the flow of water (V:1182-83), the court prevented Donovine from even testing that opinion. When Donovine asked Cetl, "do you know in this case what the flow – the direction of the flow of the water was?" the State objected that the question was "outside of her field of expertise" and the court sustained the objection. (VI:1468). (Of course, if the flow of water were truly "outside the scope" of Cetl's expertise, then Cetl should never have been permitted to testify about it in the first place. Yet, when Donovine originally objected on that basis, the court overruled his objection. (V:1182-83)).

When Donovine asked Cetl, "[W]ere you provided information in this case about what [CJ] was trying to do?" the State objected based on relevance and the court again asked Donovine to approach. (VI:1469). Donovine explained that Cetl's opinions were based on the information that she had been given, so he needed to be able to point out what information she *didn't have*. (VI:1471-72). Yet, the court would not allow that line of questioning either. (VI:1471). The court ordered Donovine to avoid asking about his own theory of the case, telling him to "cross-examine her on her testimony, not based on somebody that's not here." (VI:1472).

The court later instructed Donovine: "You cannot ask her what direction was the water flowing from the cup. You're asking her to assume that there was water in the cup and that the water tipped over right? . . . You cannot ask her what direction was the water flowing." (VI:1474). Donovine explained that he had not asked that question, but had simply tried to establish that Cetl *did not know* which way the water was flowing. (V:1475) Yet, the court would not allow defense counsel to elicit that testimony from Cetl and instead said, "that's something you can argue in closing". (VI:1475). By preventing Donovine from asking Cetl relevant hypothetical questions that challenged the basis for her opinions and addressed his own theory of the case, the court violated Donovine's state and federal Confrontation Clause rights. [18] **Van Arsdall**, 475 U.S. at 680; **Chavez**, 125 Nev. at 341 (recognizing potential Sixth Amendment problem when court places "inappropriate restrictions on the scope" of cross-examination, particularly as to "key pieces of evidence"). A new trial is required.

b. Cross-examination of Olson.

In the middle of trial, it came to the parties' attention that CJ's treating physician, Dr. Olson, had communicated with another State's witness,

[18] The court's refusal to allow Donovine to challenge the scientific basis for Cetl's opinions was particularly damaging where State's closing argument repeatedly emphasized importance of "science" and the "scientific" nature of its experts' opinions. (VII:1536,1538,1543,1546,1553,1558).

Detective DePalma, in the hallway of the courthouse prior to giving his testimony. (IV:1382-1400). The State advised the court that Dr. Olson was "very angry" that the police had consulted with Cetl about his patient. (IV:1384). The State believed he was upset because the police had "challenged" his emersion burn diagnosis. (IV:1384).

Outside the presence of the jury, the court questioned Dr. Olson about the contents of the improper communication. (IV:1388-94). Dr. Olson told the court he had asked DePalma "if he was aware that Dr. Cetl had seen this child in the Emergency Room, and [DePalma] said yes."(V:1389). Dr. Olson had also asked DePalma, "do you remember that you disputed my findings in this case and he said, no. And I said, well, that's why you asked Dr. Cetl to come to the Emergency Room to see the kid." (VI:1389).

Dr. Olson then told the court that he had *seen* Cetl in the Emergency Room. (VI:1389). Dr. Olson *also* told the court he *overheard* Cetl telling DePalma that she *agreed* that these were child abuse burns. (VI:1390). As a result of what he saw and heard, Dr. Olson deduced that Cetl must have examined CJ's hands. (VI:1389). This was significant because Cetl testified under oath at the preliminary hearing that she never saw CJ in person (I:55), but later changed her story at trial after Dr. Olson testified, admitting that she did see CJ but supposedly never *examined* him. (VI:1454-55).

Dr. Olson's heated disagreement with Cetl's assessment and his reasonable belief that she had examined CJ in the emergency room were both proper subject matters for cross-examination. See **Davis**, 415 U.S. at 316-17 (the "partiality of a witness" is "always relevant"). However, when defense counsel attempted to ask Dr. Olson about these matters, the court prohibited the line of inquiry, variously claiming that the subject matter was "speculative", "hearsay", "irrelevant" and would "embarrass" the witness. (VI:1414-20).

The court's rulings were not well-founded. First, based on what he heard Dr. Olson had a reasonable, non-speculative, basis to conclude that Cetl had examined the backs of CJ's hands in the hospital. How could Cetl have known that CJ's burns were the result of abuse if she didn't examine him? How could Cetl have disagreed with Dr. Olson's findings if she didn't examine CJ? The fact that Dr. Olson heard Cetl telling DePalma these things was relevant to establishing whether Cetl did, in fact, diagnose CJ's injuries at the hospital. And where Cetl gave conflicting testimony about whether she did or did not see CJ at the hospital, Dr. Olson's testimony on this point called her statements into question.

As Donovine explained to the court, the conversation Dr. Olson overheard was not hearsay because it was not offered for the truth of the

matter asserted. **NRS 51.035**. Rather, the statement was being offered to explain why Dr. Olson believed Cetl had examined CJ. (VI:1416).

The court also prevented Donovine from asking about Dr. Olson's heated disagreement with Cetl and the police over CJ's diagnosis, claiming that the line of inquiry would "embarrass" him. (VI:1416-20). However, as defense counsel explained (based on the State's prior representations), "Dr. Olson obviously [was] upset about a discrepancy between either his conclusion, Dr. Cetl's conclusion, or the detective's understanding of their two conclusions, and that would be important in this case that two doctors are disagreeing about" CJ's diagnosis. (VI:1418). Avoiding potential "embarrassment" to Dr. Olson was not a valid basis to restrict cross-examination on this key area of inquiry. In a case that hinged on Cetl's expert testimony, the fact that CJ's treating physician was "very angry" about her contradictory findings was an essential fact for the jury to hear.[19]

c. Cross-examination of Peltier

As already discussed in Section II, supra, the court denied Donovine an effective opportunity for cross-examination by refusing to order the State

[19] After the court precluded Donovine from inquiring about the heated nature of Dr. Olson's disagreement with Cetl, the State argued repeatedly in closing that there was "no disagreement" between the two doctors, and that the burn diagnosis was not a "point of contention between any of the doctors". (VII:1587-88).

to disclose Peltier's notes in a timely manner. (V:1215). When those notes came to light just hours before Peltier testified, Donovine's attorneys did not have an adequate opportunity to evaluate the notes or incorporate the subject matter of those notes into their cross-examination outline. (V:1215).

d. Cross-examination of prejudicial photographs

State's Exhibits 14-25 are discolored photographs of CJ's burned hands that appear much redder than the other photographs of CJ's hands that were taken that same day. (V:1055). Compare State's Exhibits 14-25 with State's Exhibits 3-13. Donovine argued that State's Exhibits 14-25 were unduly prejudicial and not a fair and accurate representation of how CJ's hands actually looked at the time. (V:1055). Donovine further argued that the photographs should be excluded because the State had not identified the person who took them and he could not cross-examine that person about why they looked so different from the other photographs. (V:1056-57). The court overruled those objections and allowed the jury to view the prejudicial photographs anyway. (V:1057).

The court's ruling was error. The photographs were testimonial in nature and subject to the right of cross-examination. See **Bullcoming v. New Mexico**, 564 U.S. 647, 664 (2011) ("[a] document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as

testimonial"). The State agreed that Donovine should be able to address the issue of discoloration on cross-examination; yet, Donovine was unable to properly exercise that right without access to the photographer. (V:1056). As a result, admitting the photographs violated Donovine's confrontation clause rights. In the alternative, because the photographs were so obviously discolored, they should have been excluded as minimally probative and unduly prejudicial. See **NRS 48.035**.

e. Cross-examination of Jasmin

At trial, Donovine was also precluded from cross-examining Jasmin as to matters related to the defense theory of the case. Initially, Donovine attempted to ask Jasmin if she had ever seen Donovine spank Jordyn. (V:1089). The State objected based on relevance and the court sustained the objection. (V:1089). Then, when Donovine began asking Jasmin about Donovine's experience caring for other children in his family, the State objected based on relevance and the court sustained the objection. (V:1090, 1093-94).

Donovine explained that both areas of inquiry were relevant to establishing his lack of motive. (V:1089-93). "[I]t's relevant to show that he's spent time alone with other children before. . . . He knows how to handle other children because he's been with them. . . . And I think that goes

directly to what the District Attorney was trying to say in their opening when they said this was the first time that Donovine had been alone with [CJ]." (V:1090-91). Nevertheless, the court concluded that Donovan's experience with other children was not "relevant" because the State did not have to prove motive. (V:1093).

The court's ruling was erroneous. Although the State did not need to prove motive beyond a reasonable doubt, "evidence of motive, or the lack thereof, is a factor that a jury may weigh in considering whether the totality of the circumstances permits it to infer guilty knowledge and intent beyond a reasonable doubt." **United States v. MacPherson**, 424 F.3d 183, 185 (2d Cir. 2005) (citation omitted); see also **Richmond v. State**, 118 Nev. 924, 942 (2002) (J. Shearing, Dissenting) ("Even though motive is not an element of a crime and need not be proven, it has virtually always been an integral element of proof in a criminal trial".) Indeed, the jury was later instructed that it could "consider evidence of motive or lack of motive as a circumstance in the case." (II:436).

The excluded testimony was directly relevant to the State's closing argument that Donovine was easily frustrated and "irritated" by children who were not his own:

- "It's frustrating, especially to someone who doesn't have his own child. Especially to someone dealing with some other man's child and you don't like that man." (VII:1590-91)

- "He's that irritated with a kid who's crying in that short amount of time on a phone call. He has the potential to get that upset. The potential to get that mad." (VII:1591)

Thus, the court erred by limiting cross-examination regarding motive on relevance grounds.

The court also erred by preventing Donovine from asking Jasmin about CJ's communications with Officer Bethard at the hospital. (V:1099). Officer Bethard claimed that he did not speak to CJ at the hospital and that he did not ask CJ how he was injured. (V:1024). Officer Bethard further testified that he did not even "know" if 2-year-old CJ was "verbal" at the time. (V:1024). Detective DePalma also claimed that Officer Bethard "wasn't able to speak with" CJ. (VI:1330).

Yet, Jasmin testified that Officer Bethard had asked CJ how he was injured and that CJ had, in fact, answered his question. (V:1099). Although CJ's response to Bethard's question would have directly impeached both Bethard and DePalma, the court erroneously prevented Donovine from eliciting CJ's response after the State objected on "hearsay" grounds. (V:1099). See **Rugamas v. Eighth Jud. Dist. Ct.**, 129 Nev. Adv. Op. 46, 305 P.3d 887, 893 (2013) ("When used solely for the limited purpose of

impeachment, inconsistent statements are not hearsay because they are not being offered for the truth of the matter asserted in the statements").

The court's error was not harmless. After preventing Donovine from eliciting CJ's response to Officer Bethard, the State improperly argued in closing that "[CJ] cannot tell the officers that respond to the hospital what happened." (VII:1556). Where the State prevented Donovine from eliciting CJ's response to Officer Bethard on "hearsay" grounds, it was improper for the State to argue that CJ could not tell officers what happened.

IV. The district court improperly denied Donovine's requested jury instruction regarding accident/misfortune.

The district court violated Donovine's state and federal constitutional rights to due process of law, a fair trial and the right to present a defense by denying a requested jury instruction on an "accident/misfortune" defense. **U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.** While this Court reviews a district court's decision settling jury instructions for abuse of discretion, it reviews the accuracy of a given instruction *de novo*. **Funderburk v. State**, 125 Nev. 260, 263 (2009).

A criminal defendant has the "right to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." **McCraney v. State**, 110 Nev. 250, 254, (1994) (citing **Margetts v. State**, 107 Nev. 616 (1991)). It is reversible

error for a court to fail to instruct the jury on a theory of the case supported by the evidence. **McCraney**, 110 Nev. at 255.

Here, Donovine requested that the jury be instructed: "A person who committed an act or made the omission charged, through misfortune or accident, when it appears that there was no evil design, intention or culpable negligence, must be found not guilty of the charge." (VII:1520,1686).

This instruction was based on **McCraney** and was an accurate statement of the law of accident. (VII:1520-21). Yet, the State objected to the instruction and the court refused to give it because "[t]he defense theory is that the defendant did not do any act, let alone an act by accident or [without] intention". (VII:1521). However, the State's objection was squarely rejected in **McCraney**. Regardless of the specific "defense theory" asserted at trial, as long as the evidence presented could support an accident/misfortune defense, then Donovine was entitled to such an instruction. See **McCraney**, 110 Nev. at 254-55 (even though defendant did not, *himself*, present evidence of accidental homicide, and even though he only argued "self-defense" at trial, evidence presented by the State conceivably supported that defense and required an instruction).

Instruction 4 advised the jury that Donovine could be found guilty of child abuse if he caused CJ "to suffer physical pain or mental suffering as

the result of abuse or *neglect*". (II:428)(emphasis added). To the extent the jury believed that Donovine improperly left boiling water on the countertop where CJ could get to it, the jury could have found him guilty as a result of his neglect. An accident/misfortune instruction was necessary to prevent such a finding.

Alternately, to the extent the jury believed Peltier's testimony that Donovine could have put CJ's hands under a faucet, the accident/misfortune instruction was still appropriate. Had the jury been given the requested accident/misfortune instruction, it could have determined that Donovine accidentally burned CJ's hands while attempting to wash them, but made up a story afterwards because he felt bad about what happened. A new trial is required.

V. The district court prevented Donovine from arguing his theory of the case in closing.

The district court violated Donovine's state and federal constitutional rights to due process of law, a fair trial and the right to present a defense by preventing him from arguing his theory of the case in closing. **U.S. Const. Amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3 and 8.**

The defense's closing argument "is a basic element of the adversary fact finding process in a criminal trial." **Herring v. New York,** 422 U.S. 853, 858 (1975). As a result, even though a court may limit closing

arguments, "denying an accused the right to make final arguments on his theory of the defense denies him the right to assistance of counsel." **Conde v. Henry**, 198 F.3d 734, 739 (9th Cir. 2000) (citation omitted) ("trial court violated defendant's right to counsel by precluding his attorney from arguing his theory of the defense in closing arguments").

During his closing argument defense counsel argued, "the State is asking you to convict Donovine beyond a reasonable doubt when they cannot even explain to you why he would do something like this. No motive is reasonable doubt." (VII:1569). When the State objected and moved to strike this argument, the court erroneously granted the request. (VII:1569).

Although motive is not a separate criminal element that the State was required to *prove* beyond a reasonable doubt, an absence of motive could certainly raise a reasonable doubt in the mind of jurors. See Section III (e), supra; see also **Aguirre v. Alameida**, No. 03-56795., 120 F. App'x 721, 723 (9th Cir. 2005) (unpublished) (closing argument properly "emphasized reasonable doubt based on a lack of motive and credibility of the state witnesses"); **People v. Estep**, 42 Cal. App. 4th 733, 738, 49 Cal. Rptr. 2d 859, 862-863 (Cal. App. 3d Dist. 1996) (upholding an instruction that "[p]resence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence,

as the case may be, the weight to which you find it to be entitled"); **State v. Pinnock**, 601 A.2d 521, 535 (Conn. 1992) (error not to instruct jury that "an absence of evidence of motive may tend to raise a reasonable doubt"). By striking Donovine's proper argument that a lack of motive could give rise to a reasonable doubt, the court improperly restricted Donovine's closing argument on a theory of defense.

The court also prevented Donovine from telling the jury how the evidence actually supported his accident defense. Donovine tried to argue the following:

> Not once did they point out the cookies and the candy or mention it. Did they not notice it, or did they not want to point it out to you? And yet, they're asking you to convict Donovine of burning a child intentionally beyond a reasonable doubt.
> If Chance would have been reaching for cookies and candy and not a hot mug of water, he probably wouldn't have grabbed the mug of water. He probably would have tried to reach past it, possibly accidentally spilling it. Who knows how it could have happened because Donovine wasn't there, but perhaps, Chance's hands could have bumped the mug spilling it over his hands or perhaps, Chance could have been trying to reach the cookies and brought his hands downward with a force on the very rim of the mug.

(VII:1576-77). At that point, the State objected and moved to strike based on facts not in evidence and the court granted the State's request, telling the jury to disregard the entire argument. (VII:1577) Then, when Donovine argued that there were no percipient witnesses to confirm the State's theory

either, and that this was another basis to find reasonable doubt, the State objected and the court sustained the objection. (VII:1577).

Although the court deemed it improper for Donovine to explain how an accident "could have" happened in this case, it allowed the State to make a virtually identical theoretical argument in rebuttal:

> "it was essentially an opportunity. Chance annoys him. Chance gets super irritating. Donovine can't handle it. Maybe he did boil coffee that day. Maybe he did put the hot water in that mug. Chance gets super irritating, he takes that small amount of water. Remember Peltier said it was a small amount of water. Chance gets super irritating, pins him, dumps the water on Chance that he was going to use for coffee. That quick. That quick, ladies and gentlemen. Irritated, crime of opportunity, hot water's already there ready to go, pours it on his hands. That could have been it. Maybe he put his hands under the faucet and heated up the water. Two minutes in the kitchen, five minutes in the bathtub, that's more than enough time".

(VII:1591-92). The court violated Donovine's right to present a defense by allowing the State to argue what "could have" happened while preventing Donovine from doing the same. A new trial is required.

VI. The district court's application of double standards throughout trial violated Donovine's rights to an impartial tribunal and equal protection under the laws.

"The rights to equal protection and due process of law are guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 8(5) and Article 4, Section 21 of the Nevada Constitution . . ."

Rico v. Rodriguez, 121 Nev. 695, 703 (2005). "Firmly embedded in our tradition of even-handed justice -- and indeed its very cornerstone -- is the concept that the trial judge must, at all times, be and remain impartial. So deeply ingrained is this tradition that it is now well settled that the trial judge must not only be totally indifferent as between the parties, but he must also give the appearance of being so." **Kinna v. State**, 84 Nev. 642, 647 (1968).

In this case, the district court was so clearly biased against Donovine that its discriminatory treatment violated both equal protection principals and his right to an impartial tribunal. "The threshold question in equal protection analysis is whether a statute effectuates dissimilar treatment of similarly situated persons." **Rico**, 121 Nev. at 703. As described in detail above, the court used its statutory discretion in a discriminatory manner, treating the State more favorably than it treated Donovine when both parties were similarly situated. See **Sections I-V**, supra. This disparate treatment occurred both prior to and during the trial when the court applied double standards with respect to Nevada's statutes on discovery, expert witnesses, and rules of evidence. See **Sections I-V**, supra.

The disparate treatment can be further seen during closing arguments when the court overruled each of Donovine's proper objections to prosecutorial misconduct while sustaining every improper objection raised

by the State, striking key defense arguments. Compare (VII:1549,1552,1582-83) (improperly overruling objections where the State misstated evidence and disparaged the defense)[20] with (VII:1569-70,1576-77) (improperly sustaining objections and striking proper defense arguments).

Because of the clear bias exhibited by the court in this case, a new trial before an impartial tribunal is required. See **Arizona v. Fulminante**, 499 U.S. 279, 308-310 (1991) (judicial bias constitutes structural error because "[t]he entire conduct of the trial from beginning to end is obviously affected by . . . the presence on the bench of a judge who is not impartial").

VII. Cumulative error requires reversal.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez**, 124 Nev. at 1195-96 (quoting **Hernandez v. State**, 118 Nev. 513, 535 (2002)). When evaluating a claim of cumulative error, this Court will consider: "(1) whether the issue of guilt is close, (2) the

[20] It is prosecutorial misconduct for the State to make false or unsupported statements of fact to the jury during closing argument. See, e.g., **Witherow v. State**, 104 Nev. 721, 724 (1988); **Collier v. State**, 101 Nev. 473, 478 (1981). It is also misconduct for the State to "ridicule or belittle the defendant or the case". **Earl v. State**, 111 Nev. 1304, 1311 (1995).

quantity and character of the error, and (3) the gravity of the crime charged." **Id.** (quoting **Mulder v. State**, 116 Nev. 1, 17(2000)).

Viewed as a whole, the combination of egregious errors in this case requires the reversal of Donovine's convictions. Among other things, the district court excluded vital evidence supporting Donovine's theory of the case, prevented him from cross-examining the State's experts and other witnesses to advance his theory of the case, denied a key jury instruction regarding his theory of the case, and prevented defense counsel from arguing his theory of the case in closing. The evidence against Donovine was not overwhelming; had the court not placed its full weight on the scales of justice in favor of the State, he easily could have been acquitted. As a new parent, Donovine's conviction for child abuse with substantial bodily harm is most certainly "grave", as it will directly impact the relationship he has with his own child going forward. Because Donovine did not receive the fair trial that was guaranteed to him by the constitution, his conviction must be reversed.

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CONCLUSION

For all the foregoing reasons, Donovine's conviction must be reversed and a new trial set before a new tribunal.

Respectfully submitted,

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DATED this 20th day of October, 2017.

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BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office