IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIS T. BROWN, Petitioner, vs. THE HONORABLE WILLIAM D. KEPHART, EIGHTH JUDICIAL DISTRICT COURT JUDGE, Respondent. STATE OF NEVADA REAL PARTY IN INTEREST	S.CT. NO: D.C. CASE NO.: C-16-319125-1

PETITION FOR WRIT OF CERTIORARI, MANDAMUS, AND/OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

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PETITION FOR WRIT OF CERTIORARI, MANDAMUS, AND/OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

COMES NOW, Petitioner WILLIS T. BROWN (hereinafter "Petitioner"), by and through his Counsel, Gary A. Modafferi, Esq., and respectfully petitions this Honorable Court for a Writ of Certiorari, Mandamus, or in the Alternative, a Writ of Prohibition.

Petitioner is scheduled for a criminal jury trial before the Honorable William D. Kephart, District Court Judge, for the Eighth Judicial District, State of Nevada. Trial is currently set to begin on February 5, 2018. Specifically at issue in this Petition are the following issues: 1) the District Court's failure to dismiss Counts 4 and 5 for lack of probable cause and the legality of borrowing or transferring proof from other counts to bolster the lack of probable cause presented in Counts 4 and 5 and; 2) the District Court's arbitrary denial of Petitioner's Widdis application for reasonable defense services.[1]

Counts 4 and 5 were not supported by sufficient probable cause and the District Court improperly borrowed or transferred illegal propensity evidence from the other three counts to sustain counts 4 and 5, in violation of Petitioner's right to

[1] Petitioner is charged by way of Information with Lewdness with a Child under the Age of 16 (Counts 1 through 3 – Category B Felony – NRS 201.230 – NOC 5874) and Lewdness with a Child under the Age of 14 (Counts 4 and 5 – Category A Felony – NRS 201.203 – NOC 50975).[1] The dates of the alleged offenses are on or between January 1, 2016 and August 1, 2016. See the Information filed on November 8, 2016 at Petitioner's Appendix (hereinafter "PA") at pp. 99-201.

due process. An Order Denying the Petition for Writ of Habeas Corpus (Pre-Trial) was filed on March 31, 2017.[2]

These allegations arise from the accusation that the Petitioner, while working as a supervisor at the Boys and Girls Club of America, inappropriately touched three girls, A.W., J.L., and H.H. The complainants knew each other and these charges arose during the same time in early August, 2016. The Petitioner had worked with young students and athletes his entire life. Petitioner has no criminal history. He lost his long standing career at the Boys and Girls Club of America over these allegations. Petitioner has been forced to accept a minimum wage job to support his wife and family. Petitioner is adamant in his innocence as to all five charges.

After being held to stand trial in the District Court, the Defense filed a Motion for Expert Services Pursuant to Widdis on April 11, 2017. The Defense previously filed the same motion in Justice Court where the Justice Court found the Defendant was indigent and qualified for an investigator to be hired at State expense. The Petitioner had also requested the services of Dr. Mark Chambers to assist in preparing a defense and to assist counsel and the investigator in providing expertise in taking statements from potential witnesses, subpoenaing evidence, and

[2] PA 270-271. Widdis v. District Court, 114 Nev. 1224,968 P.2d 1165 (1998)(Holding that a criminal defendant who has retained private counsel is nonetheless entitled to reasonable defense services at public expense upon a showing of indigency and need for the services)

understanding the motivations and signals of why allegations of improper touching are fabricated. [3]

A hearing was held in the District Court on April 24, 2017 on these matters. The Court was provided with a standard application used to determine financial eligibility in support of this motion. The financial statement attached to the Motion clearly shows that the Petitioner is indigent and that by any reasonable standard and that he could not afford the pretrial services necessary to adequately defend these charges. The Court simply stated that it did not see merit to Defendant's motion. Petitioner's father in law paid for counsel's retainer. Petitioner currently makes $8.25 per hour to support his wife and child. The motion was denied without further explanation.[4] The District Court was seemingly unaware that the Petitioner, while out of custody, had been found indigent and entitled to pretrial services by the Justice Court. Those services allowed the Defense to subpoena the Club's attendance logs and secure the appearance and testimony of Club employee Alejandra Guerrero.

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3 The use of Dr. Chambers as an expert in the field of psychosexual evaluations was recently recognized by this Honorable Court in Blackburn v. State, 129 Nev.___, 294 P.3d 422 (2013).

[4] See Order Denying Widdis Application filed on May2, 2017 at PA 324-325.

I.

RELIEF SOUGHT

Petitioner respectfully prays that this Honorable Court dismiss Counts 4 and 5 of the pending information because the State failed to present probable cause to sustain those charges at a preliminary hearing and because the District Court improperly borrowed or transferred propensity evidence from the remaining three counts to find probable cause at a hearing on Petitioner's writ. This process of borrowing or transferring evidence from the three remaining counts was further corrupted by an illegal application of NRS 48.045.[5]

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[5] The District Court explicitly relied upon NRS 48.045 in through accessing proof from Counts 1 through 3 to sustain Counts 4 and 5. (PA 262) See;

NRS 48.045 Evidence of character inadmissible to prove conduct; exceptions; other crimes.

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

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

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

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

2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of

Petitioner was entitled to have each count of the accusation considered separately in the determination of whether legal evidence constituting probable cause was presented to legally command the Petitioner to stand trial. The Justice Court and the District Court failed to protect and properly apply the necessary legal standards. Accordingly, Counts 4 and 5 must be dismissed because Petitioner was denied a reliable determination of whether probable cause existed to support Counts 4 and 5.

Petitioner also respectfully requests that the District Court be ordered to provide requested Widdis services including the use of an investigator and use of expert Dr. Mark Chambers.[6] The District Court's determination that the Petitioner did not economically qualify for those services was arbitrary and capricious.

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motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

3. Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097.

(Added to NRS by 1971, 781; A 1975, 1131; 2015, 2243)

[6] The Curriculum Vitae of Dr. Chambers was presented as an exhibit to Petitioner's first Motion for Expert Services Pursuant to Widdis filed on September 20, 2016. PA 300 at PA 305- 307.

II.

ISSUES PRESENTED FOR REVIEW

A. Whether the District Court acted arbitrarily and capriciously by failing to independently assess whether probable cause existed to sustain Counts 4 and 5 without borrowing or transferring proof from unreliable sources such as Counts 1 through 3 to accomplish that analytical process?

B. Whether the District Court acted arbitrarily and capriciously denied Petitioner's Motion for Expert Services Pursuant to Widdis?

III.

STATEMENT OF THE CASE

On November 1, 2016, a preliminary hearing was held before the Honorable James Bixler, Pro Tem, Justice of the Peace. The State was represented by Jennifer Clemmons, Esq., Chief Deputy District Attorney and the Petitioner was present and represented by current Counsel.[7] Probable cause was found to sustain a five count Information.[8]

Before the preliminary hearing, Petitioner filed a Motion for Expert Services Pursuant to Widdis.[9] The motion included a request for an investigator and an expert. The motion also included the standard application detailing, under oath, Defendant's income, assets and debts. The Defendant was then unemployed

[7] A full transcript of the proceedings can be found at PA 25-197.
[8] PA 199-201.
[9] PA 300-310.

because of these unproven allegations with monthly debts totaling $4379.[10] The Justice Court specifically found that the Defendant "is unable to afford expert services such as an investigator" in its Findings of fact, Conclusions of Law, ad Order Finding Defendant Indigent for Purposes of Widdis and Permitting Limited Payment for Services filed on September 30, 2016.[11] Funding was limited "through resolution of this matter in Justice Court"[12]After the matter was bound over to District Court, Petitioner filed a similar Motion For Expert Services Pursuant to Widdis on April 11, 2017.[13] The Defendant had provided the District Court with a second standard application detailing his financial status.[14] The Petitioner had cut his monthly expenses by nearly $1400 due to losing his job and was now supporting himself, his fiancé, and his infant child on an hourly wage of $8.25 with less than $1000 in assets.[15] A hearing on Petitioner's Widdis application in the District Court was heard and denied on April 24, 2017.[16]

At the preliminary hearing, the defense presented evidence from Nakesha Duncan, Esq., an attorney employed by Springel and Fink, a law firm hired to

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[10] PA309-310
[11] PA 312-313.
[12] PA 313
[13] PA 314-321.
[14] PA 320-321.
[15] PA321
[16] PA 322-324.

represent Boys and Girls Club of America.[17] Nakesha Duncan Esq. responded to a subpoena *duces tecum* issued by a defense investigator to produce a participant attendance activity log at the Club for August 1, 2016.[18] The records were subpoenaed to show that during an approximate twenty minute period beginning at approximately 7:00a.m., multiple children and families were passing through the front desk area where Petitioner was seated. Petitioner had the responsibility of receiving payment and checking children into the Club.[19] The attendance logs, the number of clients, and the number of transactions occurring during this specific time period – when lewd inappropriate touching was allegedly being committed by Petitioner against A.W. at the same counter – constituted substantial proof that there was no opportunity to commit this crime.[20] After substantial foundation was established regarding these records, the attendance logs were admitted into evidence.[21]

The first complainant, H.H. testified as to the substance of counts 4 and 5.[22] The Court eventually sustained a probable cause finding on the two H.H. counts

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[17] PA 27-28.
[18] Id.
[19] PA 28; A copy of the attendance records received into evidence by the Justice Court are found at PA 272- 299. The crucial time entries are between 7:02 a.m. when H.H. arrived and 7:14 a.m. when she admittedly left the desk area with her friend Tyler Alvarez.
[20] PA 30-43.
[21] PA 38.
[22] PA 43-73.

that are Counts 4 and 5 – but it did so with grave concern and it did so based upon improper legal reasoning. The Justice Court stated, "here is my take on this, and this is kind of troubling me. Counsel, you are not incorrect. These counts have to be considered separately and independently based on evidence provided on each of the counts. I got to tell you the counts involving H.H." are not very strong. They are not very strong at all. **When you take the testimony of that little 12 year old girl completely isolated by itself, it wouldn't amount to squat in terms of criminal conduct.**"[23]

Complainant A.W. testified to the substance of count 3.[24] Complainant J.L. testified to the substance of counts 1 and 2.[25] The Justice Court heard argument and the original charging document was modified.[26] The Defense then presented its second witness Alejandra Guerrero, an employee working at the Boys and Girls Club, (hereinafter "Club") on August 1, 2016.[27] Ms. Guerrero's testimony focused on the substance of Count 3 involving A.W.[28] The Justice Court heard argument and sustained added Counts 4 and 5 – Category A Felonies.[29] On January 19, 2017,

[23] PA 171.
[24] PA 88-123.
[25] PA 123-149.
[26] PA 149-156.
[27] PA 157-170.
[28] Id.
[29] PA 171-179.

Petitioner timely filed his Petition for Writ of Habeas Corpus (Pre-Trial).[30] On March3, 2017, the State timely filed State's Return to Writ of Habeas Corpus.[31] On March 14, 2017, Petitioner timely filed his Traverse in response to the State's Return.[32] On April 13, 2017, a transcript of proceeding was filed for proceeding held on Defendant's Petition for Writ of Habeas Corpus (Pre-Trial) heard and denied by the Honorable William D. Kephart, District Court Judge on March 20, 2017.[33] On March 31, 2017, an Order Denying Defendant's Petition for Writ of Habeas Corpus was filed.[34]

IV.

STATEMENT OF FACTS

Petitioner is charged by way of Information with Lewdness with a Child under the Age of 16 (Counts 1 through 3 – Category B Felony – NRS 201.230 – NOC 5874) and Lewdness with a Child under the Age of 14 (Counts 4 and 5 – Category A Felony – NRS 201.203 – NOC 50975). The dates of the alleged offenses are on or between January 1, 2016 and August 1, 2016. On Tuesday, November 1, 2016 a preliminary hearing was held before the Honorable James Bixler, Pro Tem, Justice of the Peace. The State presented three complainants,

[30] PA 1-201.
[31] PA 202-226.
[32] PA 227.
[33] PA 247-269.
[34] PA 270-271.

A.W., J.L., and H.H. H.H. is referenced in Counts 4 and 5. At the end of the State's case, probable cause was found to a reconstructed charging instrument. Two defense witnesses testified at the hearing including Nakesha Duncan and Alejandra Guerrero. Those witnesses were found and presented because of a defense investigator provided to the Defense after the Justice Court previously approved Petitioner's Widdis application.

The first witness to testify was an attorney employed by Springel and Fink, hired to represent the Boys and Girls Club of America. Nakesha Duncan Esq. responded to a subpoena *duces tecum* issued by the Defense to produce a participant attendance activity log at the Club for August 1, 2016.[35] The records were requested to show that during an approximate twenty minute period beginning at approximately 7:00a.m., multiple children and families were passing through the front desk area where Petitioner was seated, receiving payment, and checking children into the Club.[36] The attendance logs, the number of clients, and the number of transactions occurring during this specific time period – when lewd inappropriate touching was allegedly being committed by Petitioner against A.W. at the same counter. The attendance logs constituted substantial proof that there was no opportunity to commit this crime.[37] After substantial foundation established

[35] PA 27-28.
[36] PA 272- 299 , See also PA 30-43.
[37] Id.

regarding these records was heard by the Justice Court, the attendance logs were admitted into evidence.

The second witness to testify was H.H. She told the Court that she was twelve years old and currently lives in California.[38] She was in the sixth grade when she lived in Las Vegas. She then lived with her aunt and uncle.[39] H.H. went to the Boys and Girls Club in Southern Highlands almost every day both during the summer and also during the school year.[40] She knew the Petitioner as Coach Will and identified him in court.[41] They would normally say hi to each other and the only time she was in his office was when she was in trouble.[42] H.H. had been disciplined for stealing and talking back. She said when they were in his office he hugged her and touched her thigh.[43] She did not remember when this happened even after multiple promptings by the prosecutor through questioning.[44] H.H. described the touching as **"near my thigh" … "outside, kind of in the front."**[45]

Petitioner did not say anything during this incident and H.H. did not tell anyone about it- though she now said it made her "uncomfortable."[46] The touch

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[38] PA 43.
[39] PA 44.
[40] PA 45.
[41] PA 51.
[42] PA 49.
[43] PA 48.
[44] PA 49.
[45] PA 50.
[46] PA 50.

was described as being on the thigh of H.H. in the middle front part of her thigh.[47] Petitioner did not do anything with his hand when it came into contact with the middle portion of her thigh.[48] H.H. also testified Petitioner brushed up her stomach with his hand in the middle of her stomach by her rib cage.[49] This touching apparently occurred – though the testimony is painfully unclear – during a hug in the Petitioner's office.[50] H.H. said that she was touched by the Petitioner only in the office.[51] Though H.H. said the touches made her feel "uncomfortable,"[52] there was no testimony that the Petitioner ever said anything that was sexual in nature to H.H. when this contact occurred. At the end of the direct testimony of H.H. testified that Petitioner also grazed his hand on the "side of her boob."[53] This testimony would later be recalled and dismissed by H.H. further into her examination.

On cross-examination, H.H. was confronted with a tape recorded statement given to police where she told the investigating detective that Petitioner never touched her anywhere near her chest. H.H. said she did not recall the statement she

[47] PA 51.
[48] PA 51.
[49] PA 52.
[50] PA 52, 53, and 54.
[51] PA 53.
[52] PA 50.
[53] PA 56.

made to police that Petitioner did not touch her chest, the side of her boob, or any portion of her upper body.[54]

The incidents, that constitute counts 4 and 5, two class A felonies, occurred on a day when H.H. was being disciplined for talking back to a staff member named Ms. Ashley. Upon further cross-examination the witness testified that she was **not** touched by Petitioner on "the side of her breast" but rather "like on the side."[55] This entire incident all happened in one physical motion, during a hug that lasted "for a second." This testimony came in direct contradiction to the state's argument to the district court that, "Because there is pause in that action that in the state's opinion makes it 2 separate counts. He is not doing one continuous action."[56]

The Court eventually sustained a probable cause finding on the two H.H. counts that are counts 4 and 5 – but it did so with grave concern and for improper legal reasons. The Court stated, "here is my take on this, and this is kind of troubling me. Counsel, you are not incorrect. These counts have to be considered separately and independently based on evidence provided on each of the counts. I got to tell you the counts involving H.H." are not very strong. They are not very strong at all. **When you take the testimony of that little 12 year old girl**

[54] PA 58-60.
[55] PA 60.
[56] PA 154, argument by State.

completely isolated by itself, it wouldn't amount to squat in terms of criminal conduct."[57]

It will be argued that the Court was correct in its assessment of these charges and should not have found probable cause. Counts 4 and 5 should be dismissed. On further cross-examination, H.H. admitted to writing a text message which stated, "My mom is pressing charges against Coach Will. I am most likely to get paid a lot of money for it, but it will most likely go to pay for my college."[58] H.H. also testified to multiple incidents where she was disciplined by Coach Will (Petitioner) aside from stealing and talking back. These incidents included sitting on a ping-pong table and being suspended for drawing a picture of a penis.[59]

When Petitioner allegedly touched H.H. on the mid-thigh and the side of her chest, nothing sexual in nature was said by the Petitioner to H.H.[60] The reason given by H.H. as to why she thought the touching to her mid-thigh and upper body were sexual in nature were because, "It made me feel uncomfortable."[61] Even though H.H. could only give testimony about one incident, she volunteered to police in a recorded statement that it happened "four thousand million times."[62] The witness admitted that she did not tell anyone about the incident when it

[57] PA 171.
[58] PA 67.
[59] PA 67-68.
[60] PA 69-71.
[61] PA 69.
[62] PA 72.

allegedly happened.[63] Absolutely no evidence was presented at the preliminary hearing that any improper or untoward conversations ever occurred between Petitioner and H.H. This incidental touching came with no conversation from which any improper intent could be inferred or implied.

It is critical to understand the nuances and ultimate implausibility of the evidence from the remaining counts. This is because both the Justice Court and the District Court would eventually borrow or supplant the lack of probable cause presented in counts 4 and 5 with strikingly weak evidence from the remaining three counts. As argued in the Traverse, "If the Justice Court was looking to bootstrap the State's proof with borrowing or transferring evidence from other counts or complainants; Count 3 was a poor place to visit."[64]

The substance of Count 3 was provided through the testimony of A.W. The implausibility and utter impossibility of A.W.'s account of what she said occurred were directly refuted by the testimony of independent witness Alejandra Guerrero and the attendance and sign-in logs of August 1, 2016 – particularly between 7:02a.m. and 7:14a.m. The photographs of the front desk area of the club offered by Petitioner and received by the Justice Court also showed an approximate 10 feet divide between computer stations where Petitioner and A.W. were seated for the 12 minute period when the crime occurred. Alexandra Guerrero was unequivocal

[63] PA 72.
[64] PA 234.

in her testimony and observations that Petitioner did not even come close to A. W. yet A.W.'s testimony would help fill the obvious void of proof as to Counts 4 and 5.

A.W. was a fifteen years old sophomore in high school.[65] She attended the Boys and Girls Club continuously since it opened, going both after school and during the summer.[66] She had been in California during the summer of 2016 but returned to the Club at the beginning of August. The evidence would clearly indicate that this is the time period when these allegations collectively surfaced from these three friends who attended the club.

The incident involving A.W. allegedly occurred on August 1, 2016 between the hours of 7:02 a.m., the time when she arrived and about 7:15a.m., the time when she left the desk area with her friend Tyler Alvarez. The Petitioner was helping out behind the desk because another employee was unable to be there when the Club opened at 7:00 a.m. The records subpoenaed by the defense, combined with the testimony of Alejandra Guerrero, another Girls and Boys Club employee, were argued as proof that A.W.'s allegations were spurious and that Petitioner clearly did not have the opportunity to assault A.W. A.W. testified that she returned from her California vacation she also returned to the Club on August 1, 2016 at 7:00 when it opened in the morning. She testified that Petitioner was

[65] PA 89.
[66] PA 91.

seated behind the desk where children are checked into the computer system when they enter the facility.[67] A.W. said she went to sit behind the desk where Petitioner was working "just talking catching up."[68]

A.W. testified "I was wearing this romper thing, so my legs were out. It was short. He said my legs looked amazing and he asked if he can touch them." … "I chuckled, because it was weird, and I was like; sure I guess..." "He touched my leg."[69] A.W. said Petitioner touched her mid-thigh in a continuous motion.[70] Approximately five minutes after the touching allegedly occurred, the person who usually works the desk came to replace Petitioner, according to A.W.[71] A.W. testified that once the woman came to work, A.W. went into Petitioner's office and he proceeded to ask her questions of a sexual nature.[72] A.W. said the office door was closed.[73] A.W. said she told J.L. about the incident that same day.[74] Alejandra Guerrero, an employee of the Club would later testify that A.W. did not ever go

[67] It is crucial that this Honorable Court review the photographs taken by the defense investigator showing the front desk layout. The seats where Petitioner and A.W. were sitting are set many feet apart and the open setting allowed for Alejandra Guerrero to see what was occurring.
[68] PA 92.
[69] PA 93.
[70] PA 94.
[71] PA 95.
[72] PA 95.
[73] PA 95.
[74] PA 97.

into Petitioner's office and that Petitioner was never close enough to A.W. to even touch her.[75]

On cross-examination defense counsel presented the witness with photographs marked as Exhibits B through D of the counter area where this alleged assault occurred.[76] A.W. testified that the set-up of the counter space by the reception area had the chairs where the Petitioner and A.W. were seated but those chairs were closer than they usually were. Instead of being in front of the respective computers they served, A.W. stated that the chairs were approximately two feet from each other.[77] A.W. testified that she arrived at 7:02 that day.[78] That exact time was reflected in the attendance logs received as Exhibit A.

A.W. testified that the touching, which is the basis for Count 3, happened "maybe 15, 20 minutes" after she arrived at the front desk seat at 7:02a.m.[79] A.W. testified that she was not paying attention to the people coming into the facility.[80] Petitioner was tasked with signing these children in and taking fees for the club for those children. A.W. also testified that she did not notice Alejandra Guerrero, the

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[75] PA 161, 162 and 163.
[76] Defense Exhibit A, at the preliminary hearing, was marked and received. Exhibit A was the participant attendance log authenticated by Nakesha Duncan Esq. for August 1, 2016. It reflected the children who were checked into the Club during the twelve minute window (7:02 a.m. to 7:14 a.m.) of this alleged assault. See PA 272-299.
[77] PA 100.
[78] PA 100.
[79] PA 101.
[80] PA 102.

club employee; standing on the other side of the desk who would eventually testify that she did not see what A.W. testified had happened even though Ms. Guerrero was in full position to see exactly what happened.[81]

A.W. testified that she had been admonished not leave the premises of the Club with Tyler Alvarez.[82] On her first day back to the Club after returning from California, A.W. testified that she left the front desk area with Tyler Alvarez as soon as he came into the Club on Monday, August 1, 2014 at 7:14a.m.[83] This fact was established both by A.W.'s testimony and the participant attendance records admitted as Exhibit 1.[84] Accordingly, the offense, if it did occur as alleged, happened between the arrival of A.W. at the Club at 7:02a.m. and before Tyler Alvarez' arrival at the Club at 7:14. According to A.W., it was during this twelve minute period that A.W. was subjected to a lewd and inappropriate touching and invited back into the office for sexual conversation with Petitioner.[85]

A.W. further testified that the woman, who normally checks in the children, takes their fees, and swipes their identification cards into the system returned so that Petitioner could vacate his ongoing duties at the desk to speak with her in the

[81] PA 102 see also PA 161,162, and 163.
[82] PA 103.
[83] PA 104.
[84] PA 272-299.
[85] PA 105.

office.[86] This testimony was contradicted by A.W.'s own testimony that she left the desk area with Tyler Alvarez after Tyler Alvarez came into the club at 7:14 a.m.[87]

A.W. testified to a disciplinary incident handled by Petitioner and a track director named Elena where A.W. accused a boy named Malik of attempting to grab and kiss her at the Club.[88] This incident occurred on August 8, 2016 – two days before the allegation against Petitioner by A.W. and the two other girls surfaced.[89]

J.L. went into the office after A.W. during the disciplinary meeting about Malik.[90] Two days later A.W. told a counselor that Petitioner had touched her and this investigation began. That same morning A.W. called J.L. to talk about Petitioner and "things he may have done,"[91] A.W. told J.L., according to her testimony, that Coach Will (Petitioner) touched her from the ankle to the thigh.[92] A.W. called both J.L. and the police the same day. A.W. was upset and wanted an

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[86] PA 105.

[87] PA 273 (Alvarez incoming attendance record) PA118 and 119(A.W. said she spoke with Alvarez as soon as he came in and then left to the front with him without ever speaking at that time with Petitioner- This version is inconsistent with A.W.'s description that she had further inappropriate conversation in Petitioner's office. Again, Ms. Guerrero was certain A.W. never went into Petitioner's office. PA 161,162, and 163.)

[88] PA 106-107.

[89] PA 106.

[90] PA 106.

[91] PA 109.

[92] Id. and PA 143.

update on the status of her accusation but Metro told her she needed to contact CPS.[93]

Part of the reason that A.W. was so upset that she called both Metro and CPS, was because Petitioner was still working at the Girls and Boys Club.[94] The witness testified that she was "uncomfortable" as the reason for not calling the police about this incident that so upset her on August 8, 2016 as opposed to when she called the police several days later.[95] A.W. stated she may have called Metro the same day she got into trouble for the physical incident with Malik.[96] This assault is alleged to have taken place behind the front desk of the Boys and Girls Club on August 1, 2016 between 7:02a.m. when A.W. arrived and 7:14 when Tyler Alvarez arrived. It was at that time that A.W. left the front desk area to spend time with Tyler Alvarez the "front of the doors." A.W. stated there were "a lot of people coming in" the club and they were registering and paying but she could not recall their names.

During this approximate time period, the Hamilton family with Liana, Michelle and Selinalei came in with their parent at 7:02a.m.[97] A.W. acknowledged

[93] PA 115.
[94] PA 115 and 116.
[95] PA 116.
[96] PA 117.
[97] PA 119.

she saw Petitioner "writing them or typing them in."[98] Wyatt Hardy came in at 7:17a.m.[99] Giselle Kurtz came in at 7:20a.m.[100] Chase Lawson came in at 7:15a.m.[101] Caleb Little and his sister Hailey Little came in at 7:08a.m.[102] Alvaro Lopez and his sister Sofia came in at 7:12a.m.[103] Charles McMains came in at 7:16a.m.[104] Hazel Jennel Molano and her sister Sienna came in at 7:13a.m.[105] Jacob Ortega came in at 7:04a.m.[106] Emma Sharp came in at 7:09a.m.[107] Carmen Pipes came in at 7:21a.m.[108] Isabell Thomas came in at 7:18a.m.[109] All of these times and all of these children were checked in, registered, and paid for during this limited time window when Petitioner is alleged to have committed the lewd act with A.W. and taken her into his office for inappropriate conversation.[110]

Petitioner called Alejandra Guerrero to testify to the events of August 1, 2016. Ms. Guerrero was working as an employee of the Boys and Girls Club on

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[98] PA 119.
[99] PA 119.
[100] PA 120.
[101] PA 120.
[102] PA 120.
[103] PA 120.
[104] PA120.
[105] PA 120.
[106] PA 120.
[107] PA 121.
[108] PA 120.
[109] PA 120.
[110] See Exhibit A presented at hearing. Also see PA 272-299.

August 1, 2016.[111] Her responsibilities included assisting in opening the club and assisting in the game room **"which is right next to the front desk."**[112] Ms. Guerrero was shown a photograph admitted as Defendant's Exhibit C which confirmed the direct vantage point that she had during the time this alleged assault occurred.[113] She stated that Petitioner was seated at the front desk on the right hand side looking towards the main entrance.[114] He remained there at that seat the entire time. A.W. came and sat behind the desk where the other computer station is located. Ms. Guerrero testified that A.W. did not come within 2 feet of the Petitioner during this time period (as previously testified to by A.W.) and Ms. Guerrero was in a position and would have had the opportunity to see movement of the chairs to a two foot range had that actually occurred.[115]

The distance between the witness and the Petitioner was approximately twenty feet.[116] The witness testified that she never saw A.W. leave that area to go into Petitioner's office. The witness testified that she would have seen that if that happened. The witness testified that the Petitioner was busy, "Receiving, taking care of parents walking in, signing in their kids in, trying to make payments,

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[111] PA 158.
[112] PA 158. The photographs submitted by the Defense clearly support this physical description.
[113] PA 159.
[114] PA 159.
[115] PA 160.
[116] PA 162.

whatever it is. He is in charge of that."[117] The witness had no special relationship with the Petitioner and only knew him for 3 months before this incident.[118] Petitioner was terminated after these allegations were made against him and the witness continued to work at the club.[119] The witness was asked the following questions and gave the following responses:

> **Q. So from your vantage point, from what you saw that day, what you observed of Coach Will and Aricha Willis, would you say that it was physically impossible for Coach Will to touch that girl?**
> **A. Unless he got up and walked to her. There is no way you reach from one computer station to the other.**
> **Q. Did you ever see him do that?**
> **A. No.[120]**

The testimony of J.L. provided the substance of Counts 1 and 2. When considering the transfer or borrowing of evidence from Counts 1 through 3 to sustain Counts 4 and 5, it is critical to recognize that J.L. initially described the alleged inappropriate touching which comprised Count 1 as an accident. J.L. testified that she is fifteen years old and that she attended the Boys and Girls Club of Southern Highlands after school.[121] She had gone to Hawaii for the beginning of summer in 2016 but came back to Nevada and the Club at the end of July.[122] She testified that when she returned Petitioner "started acting a little different" and

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[117] PA 162.
[118] PA 163.
[119] PA 158.
[120] PA 163.
[121] PA 125.
[122] PA 125.

asked her inappropriate questions.[123] On that same day J.L. testified that he hugged her and touched the middle of her butt with one hand for a couple of seconds. She testified "It wasn't there for long." This was the substance of Count 1. J.L. testified that several days later in the kitchen, Petitioner asked her for a hug and both of Petitioner's hands touched her butt, again, "It was for a couple of seconds."[124] This was the substance of Count 2. The Petitioner did not say anything sexually inappropriate and neither did J.L.[125]

On cross-examination, J.L. testified that she told police that she was not sure whether the first incident, Count 1, was an accident.[126] She also testified that from the first time she began attending the Club in February 2016 until she returned from Hawaii at the end of July, 2016 nothing inappropriate occurred with the Petitioner.

J.L. testified that the day the police questioned her she received a phone call from her friend A.W. who told her what she had just told the police about the Petitioner.[127] J.L. also had a conversation about Petitioner with H.H.[128] The "only" thing that H.H. told J.L. about an inappropriate touching by Petitioner was that

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[123] PA 128.
[124] PA 129-130.
[125] PA 132.
[126] PA 134.
[127] PA 138.
[128] PA 138.

H.H. said "he (Petitioner) toucher her (H.H.) boobs in a bowling alley."[129] Petitioner was never with H.H. at a bowling alley and H.H. herself testified that Petitioner did not touch her boob and she never described being at a bowling alley with the Petitioner.[130]

The day that J.L. reported these allegations was the same day J.L. got into trouble at the Club for physical contact, specifically kissing Malik with A.W.[131] Malik denied wrongdoing and J.L. and A.W. got into trouble.[132] J.L. was in the office being disciplined by Elena, the track director, and Petitioner.[133] J.L. testified that when she left the office that day, she felt like she had done something wrong with Malik.[134] J.L. also testified that A.W. was upset with Petitioner "because she felt Coach Will was blaming her for the incident.[135] J.L. had previously been disciplined by Petitioner at the Club for kissing boys at the Club.[136] This latest incident involving Malik had heightened tensions between her and what was expected of J.L. by the Club staff. Alejandra Guerrero had also reprimanded J.L. about her inappropriate conduct at the Club with her boyfriend.[137]

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[129] PA 139.
[130] PA 65.
[131] PA 140.
[132] PA 140.
[133] PA 141.
[134] PA 142.
[135] PA 142.
[136] PA 143.
[137] PA 144.

When Counsel asked J.L. to describe the second incident, J.L. said the Petitioner crossed his wrists during the time he touched her butt is the pantry. J.L. then pointed out that this awkward, seemingly physically impossible explanation of events was being inaccurately portrayed in Court because, "He is bunched up, he can't reach correctly because he is in a suit."[138] Her physical description of this alleged assault, aside from Petitioner allegedly crossing his wrists on her bottom, included that Petitioner was "sticking his butt out" during this hug.[139] J.L. said the contact lasted a couple of seconds but she could not be sure.[140]

J.L. recalled an incident on Memorial Day when she was outside the Boys and Girls Club with his family and she was wearing a bikini. Coach Will told her to put some clothes on and she reacted strongly stating that Petitioner did not control her outside of the Club.[141] At the end of the State's evidence, the Petitioner strongly objected to any further proceeding on the H.H. Counts.

This Counsel stated: "There wasn't even slight or marginal evidence to prove that there was sexual gratification or the intent to arouse. And counts with (H.H.) should be dismissed. That to me this is the type of incidental every day contact that people have, that if that happens on an elevator, and I got charged for an A felony, I would be like whoa, is this what this world come to, and that's the

[138] PA 145.
[139] PA 145.
[140] PA 146.
[141] PA 147.

way the Court has to look at this. You can't legally borrow (J.L.) and (A.W.) testimony; however skewed it may be in my mind to supplant the evidence for sexual gratification, arousal intent, showing that this is anything other than incidental conduct. These counts should be thrown out."[142]

The Court seemingly agreed with Petitioner's counsel that evidence and/or inference that proof should not be borrowed from the counts involving A.W. and J.L. to sustain the H.H. Counts, particularly when that proof is considered unreliable and/or "slight" in character. The Court stated, "Counsel, you are not incorrect. These counts have to be considered separately and independently based on the evidence provided on each of these counts."[143] The Court was rightly concerned about this specific argument and the Court made those concerns known to the State: "I am not quite certain, I don't mean to preview my findings and cutoff your arguments, but **I want the State to address that. If you didn't have the 2 other victims, the only thing you had was Holiday Howland's testimony, if her case was all by itself, how would you argue that what happened, his touching her thigh, brushing her on the side as they separate, how would you interpret that as a lewd act?**[144] The Court eventually sustained counts 4 and 5 as to H.H. The Court dismissed Count 6 and declined to add Count 7. The Court then,

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[142] PA 92.
[143] PA 171.
[144] PA 172.(emphasis supplied)

sua sponte, took Petitioner off house arrest.[145] The hearing on the Petition was held on March 20, 2017.[146]

At the hearing on Petitioner's pretrial writ, the District Court judge initially began his approach to his analysis by using the allegation of improper language as to A.W. and J.L. to sustain counts 4 and 5 as to H.H.[147] He then went on to seemingly employ NRS 48.045 to borrow or transfer … "this independent evidence as a prior bad act under 48.045…"[148] This counsel argued strenuously against borrowing evidence from other counts particularly without a formal Petrocelli hearing or a finding of reliability from the source of transfer.[149] For example how could the Court possibly borrow evidence, within the strict constraints of Petrocelli from the circumstances of count 3 and the testimony of A.W. The District Court went directly to borrowing the proof or lack of proof from the alleged inappropriate conversation used in Count 3,[150] however, the defense proved that A.W. was a clearly fabricating her story and Petitioner did not have the opportunity to come close to her during the time of the act of lewdness. Petitioner

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[145] PA 179.
[146] PA 247-269.
[147] PA 249.
[148] PA 250.
[149] PA 251 citing to Petrocelli v. State, 101 Nev. 46, 692 P.2d. 503 (1985)(This Court held that **before** prior bad evidence of a prior bad act can be admitted pursuant to NRS 48.045, the State must show by **plain, clear and convincing evidence** that the defendant committed the offense.)
[150] See e.g. PA 248.

never went close to that girl and he surely did not enter his office with her. If the act was dubious then certainly A.W.'s claim that it was accompanied by inappropriate conversation was equally dubious. Yet, the court determined that NRS 48.045 allowed for transfer of evidence without any finding of reliability before that transfer or act of borrowing occurred.

The Court stated: "And that's why I – I got into 48.045, because that's the only way I could think of. And when he made that comment, that I've got to take from the other case to show that, he was saying, I believe 4 and 5's weak, but when I know what his intent is, okay, and coupled with that, I have – there's sufficient evidence for a bind over. That's how I look at it."[151]

The District Court used a hypothetical to illustrate its reasoning that evidence could be borrowed from Counts 1 through 3 to sustain Counts 4 and 5. The District Court argued that had the Petitioner already been convicted of Counts 1 through 3 and a decision to then charge Petitioner with Counts 4 and 5 was made then the State could access the proven bad act evidence of the convictions to assist in convicting the Petitioner of Counts 4 and 5.

The Court reasoned: "Four and five come later, because the young – the young girl says, you know what, he did this stuff to me, too, the young – HH comes forward after the fact. And he's already been through the process on the

[151] PA 262.

other. Everyone knows about his actions on 1, 2, and 3; all right? HH comes forward and says, you know what, I think he was doing this stuff to me, too. The State now says, you know what, Judge – HH, we agree with you, because we can tell based on his actions in 1, 2 and 3.So they charge just Counts 4 and 5. You come in and say, Judge, there's absolutely nothing here to support it. In their case – in that case, though, if they just presented HH by herself, they'd probably have a harder time, because there's no evidence of 1, 2 and 3. But if they present it to the JP and said, Judge, we need you to consider 1, 2 and 3, these actions as well, as prior bad acts under 48.045. The Judge then takes into consideration 1, 2 and 3 and says, you know what, I agree with you. His intent's clear to me. His intent is that he's messing with these young girls and that's what his plans are. And he's already – he's already showed it in 1, 2 and 3. And so that's what – so I'm going to use that to bind up on 4 and 5. That's the scenario."[152]

Counsel for the Petitioner argued that the combination of not honoring the probable cause standard along with the transfer or borrowing of proof from Counts 1 through 3 to sustain Counts 4 and 5 prevented a reliable independent and discrete probable cause assessment as to counts 4 and 5:

> MR. MODAFFERI: And I never have agreed with the fact that everyone emasculates the probable cause standard by calling it slight or marginal, even though the Supreme Court used that language in one case.

[152] PA 261.

> You know, the standard is still the same standard. It's probable cause. It's the amount of evidence that they need the government to get in your house, or to arrest you, or to tap your phones; it's probable cause.
>
> And you still have to view it in that paradigm. You can't just because the Supreme Court has said slight or marginal at one point; describe it like the other attorney did as a scintilla. It's not.
>
> And I think that in this jurisdiction where there is no Rule 29 motion, there's nothing to take from the trial Judge, the ability to sever these counts out because a prima facie case hasn't been made during trial, it's incumbent upon you, and it's incumbent upon the Grand Jury to exercise that independent shield against unwarranted charges.[153]

The District Court emphasized that in his analysis of the matter the quantum of evidence to sustain a probable cause assessment "…**is so slight,**"[154] and that, "because of the standard and what the – the way the standard is, it's a hard road for the defense. I openly admit that."[155] The Court then denied the Petition[156] and an order codifying that ruling was filed.[157]

V.

JURISDICTIONAL STATEMENT

Mandamus is available to direct the district court to do what the law requires. Such extraordinary relief is available where the Petitioner has no plain,

[153] PA 266 – The reference to "scintilla" of evidence as the probable cause standard to assess a pretrial writ of habeas corpus was taken by chance from a defense attorney that argued a pretrial writ of habeas corpus immediately preceding Petitioner's argument. See PA 266. This is not the appropriate standard.
[154] PA 265.
[155] PA 265.
[156] PA 268.
[157] PA 270-271.

speedy, and adequate remedy in the ordinary course of law.[158] Consideration of a petition for extraordinary relief may be justified where an important issue of law needs clarification and public policy is served by the Supreme Court's invocation of original jurisdiction.[159] Judicial economy and sound judicial administration militate in favor of granting the requested relief at this point of the proceeding.[160] Specifically, a trial on the merits would be a waste of judicial resources and deny the Petitioner Due Process where before trial the district court failed to apply the probable cause standard and he was forced to go to trial with three complaining witnesses when only two should have ever been allowed to take the stand. Similarly, a trial on the merits would be a colossal waste of judicial resources should Petitioner be forced to go to trial without the services of an investigator and an expert.

Issues of clarification, public policy, urgency, strong necessity, judicial economy, and sound judicial administration are all important considerations in

[158] Margold v. District Court, 109 Nev. 804, 805 (1993) A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion. International Game Tech v. Dist. Ct., 124 Nev. 193, 197 (2008).

[159] Diaz v. Eighth Judicial District Court, 116 Nev. 8 993 P.2d. 50 (2000).

[160] See e.g., State v. Babyan, 106 Nev. 155, 175-176 (1990).

determining whether this court should exercise its discretion to grant writ relief.[161] NRS 34.160 states that a writ of mandamus may issue to compel an act which the law especially enjoins as a duty resulting from an office, trust or station or to control a manifest abuse of arbitrary or capricious exercise of discretion.[162] A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.[163] By way of analogy, this Honorable Court has noted that mandamus is the appropriate remedy where a motion to dismiss an indictment has been denied by the District Court, as there is no other speedy, adequate, remedy at law.[164] Similarly, there was no apparent rationale to the decision to deny Petitioner an investigator or expert on the basis of a minimum wage salary particularly when just weeks before another court had specifically found Petitioner to be indigent. It is respectfully submitted that this was not the act of sound judicial administration and it should be reversed.

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[161] Clay v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 48, 305 P.3d 898, 901 (2013). The constitution power to issue writs of prohibition and mandamus is grounded in Nev. Const. art. 6, § 4.

[162] NRS 34.160, State v. Eighth Jud. Dist. Ct., 127 Nev. Adv. Op. 84, 267 P.3d 777, 779 (2011)

[163] Id. at 780 (quotation and alteration omitted.)

[164] See Solis-Ramirez v. Eighth Judicial Dist. Court ex. Rel County of Clark, 112 Nev. 344, 913 P.2d 1293 (1996)

VI.

LEGAL ARGUMENT

A. **Both the Justice Court and District Court abused their discretion by failing to indepently assess whether probable cause existed to sustain Counts 4 and 5 without borrowing or transferring proof from Counts 1 through 3 to accomplish that analytical process**.

The Justice Court clearly recognized the absolute paucity of proof as to counts 4 and 5 but instead of dismissing those counts it decided to sustain those counts by borrowing the evidence presented in counts 1 through 3. The Justice Court stated, "here is my take on this, and this is kind of troubling me. Counsel, you are not incorrect. These counts have to be considered separately and independently based on evidence provided on each of the counts. I got to tell you the counts involving H.H." are not very strong. They are not very strong at all. **When you take the testimony of that little 12 year old girl completely isolated by itself, it wouldn't amount to squat in terms of criminal conduct.**"[165] The Justice Court specifically inquired of the State how these acts legally translated to the offenses alleged: "I am not quite certain, I don't mean to preview my findings and cutoff your arguments, but I want the State to address that. If you didn't have the 2 other victims, the only thing you had was Holiday Howland's testimony, if her case was all by itself, how would you argue that what happened, his touching

[165] PA 171.

her thigh, brushing her on the side as they separate, how would you interpret that as a lewd act?"[166]

Again the two acts constituting lewdness are (1) when Petitioner is alleged to have touched H.H. with his "arm "near" the "outside" part of her "middle thigh"[167] and, (2) when Petitioner brushed up his hand "near the middle, like my stomach, where your rib cage is."[168] H.H., upon leading by the prosecutor, indicated that this second act was on the side of her breast though H.H. did not recall telling police in her initial statement that Petitioner **did not touch her chest.**[169] There was absolutely no provocative or sexually explicit language used by either H.H. or Petitioner. Counts 4 and 5 are nothing more than incidental, non-criminal touching. The finding that these circumstances equate to probable cause defies both logic and legality.

The standard to hold a citizen for trial is whether the State proved probable cause that a suspect committed the offense alleged. In order for a defendant to be bound over, the State must prove (1) probable cause to believe that a crime has

[166] PA 172 – Counts 4 and 5 are Lewdness with a Child Under the Age of 14, a Category A felony, NRS 201.230 "and shall be punished by imprisonment in the State prison for life with the possibility of parole, with eligibility for parole when a minimum of ten years has been served, and may further be punished by a fine of not more than $10,000.00."

[167] PA 50 and 51.

[168] PA 52.

[169] PA 57-60. Upon further cross-examination H.H. responded, when asked did he (Petitioner) get towards the center of your breast, "like on the side. I don't know how to answer that. I just know it was on the side."

been committed, and (2) probable cause to believe that the person charged committed the crime.[170] The Justice Court recognized the paucity of evidence regarding Counts 4 and 5 but still bound those counts up to District Court. Counts 4 and 5 are not sustainable under any test of probable cause. It is generally assumed by the United States Supreme Court and all lower courts that the same quantum of evidence is required whether one is concerned with the determination of probable cause to search, to arrest, or to charge.[171]

In Abzill, the Nevada Supreme Court held that before a person can be held for trial two things must be proved by sufficient legal evidence before a grand jury if an indictment is sought or before a magistrate if a complaint is filed and a preliminary hearing is held. They are (1) the fact that a crime has been committed; and (2) probable cause to believe that the person charged committed it.[172] The record is barren of such evidence. No crime was proven to be committed. Use of collateral evidence which is in and of itself both "slight" and unreliable is not a legally countenanced method of determining probable cause.

The conduct between Petitioner and H.H. was nothing more than incidental conduct and lacked any evidence that it was sexual in nature. In order to even

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[170] Sheriff v. Richardson, 103 Nev. 180 734 P.2d. 735 (1987)
[171] See United States v. Humphries, 372 F.3d. 453 (4th Cir. 2004)(quantum of facts the same for either determination).
[172] Azbill v. State, 84 Nev. 345, 440 P.2d. 1014 (1968). Hicks v. Sheriff, 86 Nev. 67, 464 P.2d. 462 (1970)

consider this conduct as lewd under the statutory definition,[173] evidence must be borrowed or moved from the testimony of A.W. and J.L. This is simply not legally permissible.

Merely touching a person is not and cannot be a crime. It must be proven that it was done with the necessary intent of arousing or appealing to, or gratifying, the lust or sexual desires of that person or of the child.[174] This did not happen and the Justice Court recognized that the only way it could possibly infer this necessarily element was to also include in this consideration the factually weak circumstances involving A.W. and J.L. This methodology is legally unsound. If this reasoning was adopted, every female that Petitioner touched could be included in this Information because the borrowed or transferred evidence from Counts 1 through 3 would provide the State with that power. The shield and protection of a reliable probable cause determination would be destroyed should this analysis become the new process.

The Justice Court had a legal duty to compartmentalize and distinguish the evidence produced on each count. In the words of the Justice Court, "I got to tell you that the counts involving H.H. are not very strong. They are not very strong at

[173] NRS 201.230 defines this crime as "willfully and lewdly committing any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any member thereof, of a child under the age of 16 (or 14), with the intent of arousing, appealing to, or gratifying the lust or passion or sexual desires of that person or that of the child."

[174] Id.

all. When you take the testimony of that little 12 year old girl completely isolated by itself, it wouldn't amount to squat in terms of criminal conduct."[175] The Court had a duty to consider the weight of each count, specifically as they related to separate accusers, in isolation. This legal duty was not followed and the failure to do so mandates the dismissal of counts 4 and 5.

If the evidence produced at the preliminary examination establishes a reasonable inference that the defendant committed the crime charged, probable cause exists to order the defendant to answer in the district court.[176] An inference is a deduction which the trier of facts makes from the facts proved without an express direction of law to that effect. It must be reasonable and not so remote as to be unwarranted. Probable cause requires that the evidence be weighed toward guilt, though there may be room for doubt. The facts must be such as would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion.[177] Both the Justice Court and the District Court failed to recognize the necessity of considering counts 4 and 5 separately as required by the due process clauses. Petitioner in his argument to the District Court used a prejudicial joinder analysis to best underscore this requirement. This Counsel argued:

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[175] PA 171.
[176] Morgan v. Sheriff, 86 Nev. 23, 476 P.2d 600 (1970).
[177] State v. Von Brincken, 86 Nev. 769, 476 P.2d 733 (1970); Ex Parte Kline, 71 Nev. 124, 282 P.2d 367 (1955)

> In Tabish and Murphy, the Nevada Supreme Court recognized that in certain instances the prejudicial joinder of counts could not be sustained because, as in Tabish and Murphy, it could not "conclude beyond a reasonable doubt that a limiting instruction was sufficient to mitigate the prejudicial impact of the joinder on the jury's consideration of Appellant's guilt on the remaining counts."[178] The Nevada Supreme Court in Tabish and Murphy noted the law permits joinder of counts in certain instances when it can be assured that there will be no borrowing of proof from one count to the other to establish guilt for another joined count. The Court stated, "…the jury is then expected to follow the instruction in limiting its consideration of evidence."[179] The Nevada Supreme Court, in underscoring the need for separate, discrete, and compartmentalized assessment of proof as to each count, stated that such a failure may "…prevent the jury from making a **reliable judgment about guilt or innocence.** In our view, the Binion charges presented the jury with a close case, and the joinder of the Casey counts rendered the Binion counts fundamentally unfair."[180] The Supreme Court's concerns on this matter were eventually realized upon retrial with Ms. Murphy's subsequent acquittal on the murder allegation concerning Mr. Binion. The Supreme Court noted that the limiting instruction demanding independent consideration of proof as to each count in the first trial, **"was inadequate to prevent the improper "spillover" effect of improper joinder."**[181]

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[178] Tabish and Murphy v. State, 119 Nev. 293, 294, 72 P.3d. 584, 586 (2003) The Court cited in fn. 16. U.S. v. Smith, 795 F.2d 841, 851 (10th Cir. 1986)(holding that refusal to sever charges was not manifestly prejudicial where both the prosecution and court took great pains to **avoid emphasizing the charges were somehow connected(emphasis supplied)**) In Petitioner's case, the prosecution is arguing exactly the opposite approach should be taken and that the void of proof as to Counts 4 and 5 should be filled by borrowing it or transferring it from Counts 1through 3.

[179] Id at 591; See PA 230-231.

[180] Id at 591-92; See PA 230-231.

[181] Id at 592. (emphasis supplied); See PA 230-231.

Instead of avoiding the improper "spillover" effect of improper joinder, both courts below used joinder to lessen the standard of probable cause demanded by law. Recently, in Rimer, this Honorable Court underscored this exact argument in the context of prejudicial joinder of counts.[182] There this Court stated:

> Courts construing NRS 174.165(1)'s federal cognate have identified three related but distinct types of prejudice that can flow from joined counts: (1) the jury may believe that a person charged with a large number of offenses has a criminal disposition, and as a result may cumulate the evidence against him or her or perhaps lessen the presumption of innocence; (2) evidence of guilt on one count may "spillover" to other counts, and lead to a conviction on those other counts even though the spillover evidence would have been inadmissible at a separate trial; and (3) defendant may wish to testify in his or her own defense on one charge but not on another.
> 1A Charles Alan Wright & Andrew D, Leipold, *Federal Practice and Procedure* § 222 (4th ed.2008). We have recognized that the first of these types of prejudice may occur when charges in a weak case have been combined with charges in a strong case to help bolster the former. Weber, 121 Nev. at 575, 119 P.3d at 122.[183]

The courts below authorized exactly what this Court in Rimer held to be prohibited. The courts below sustained probable cause in a weak case simply because it was combined with a "stronger" case to help bolster the former. This is not allowable. This procedure emasculates the probable cause protection against unwarranted charges. It is even more vexing in this instance because the cases which were borrowed from were not strong at all.

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[182] Rimer v. State, 131 Nev. _____, 351 P.3d 697, 715 (2015).
[183] Id. at 709.

As previously argued count 3 involving A.W. was a physical impossibility. Alejandra Guerrero and the admission of the attendance logs clearly prove that A.W. was lying. The slippery slope of borrowing from other counts at a preliminary hearing was detailed in Petitioner's Traverse without a Tinch or Petrocelli hearing, the use of proof such as the proof used to sustain count 3 to further sustain counts 4 and 5 is simply illegal and ultimately resulted in an unreliable and unsupportable bind over of counts 4 and 5. A reliable determination of probable cause of constitutional protection is as worthy as a reliable determination of guilt or innocence. To corrupt the practice that leads to a reliable determination of probable cause by allowing a seemingly whimsical shell game of proof by borrowing evidence from unrelated allegations by other complainants is not in keeping with due process.

Petitioner argued in his Traverse that Count 3 was not worthy of borrowing or transferring proof even if this process had some modicum of legality. Petitioner argued:

> If the Justice Court was looking to bootstrap the State's proof with borrowing or transferring evidence from other counts or complainants, count 3 was a poor place to visit. While A.W. testified that she was sexually abused in a public space behind the reception desk of the Boys and Girls club between the hours of 7:02 a.m. and 7:14 a.m. transpired in her twelve minute stay behind the Club's administrative desk, a dispassionate percipient witness testified that this never happened. While A.W. testified that inappropriate conversation took place immediately after this inappropriate touching at the Club's administrative desk, a

> dispassionate percipient witness testified that A.W. did not even enter Petitioner's office that morning. Alejandra Guerrero, a counselor and employee at the Club, has no connection to either the Petitioner or A.W. She was working near the front desk the day that A.W. was allegedly sexually molested while sitting behind the administrative desk of the Club. She testified to a certainty that she never saw A.W. get close enough to the Petitioner for this leg touching to have occurred.[184]
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> **Ms. Guerrero was specifically asked, "so from your vantage point, from what you saw that day, what you observed of Coach Will and (A.W.), would you say it was physically impossible for Coach Will to touch that girl?" Ms. Guerrero answered "unless he got up and walked to her there is no way you reach from one computer station to the other." She was asked "Did you ever see him do that?" and she emphatically stated "no."**[185] This incident is resounding proof of why evidence from one count should not be borrowed or transferred to establish guilt in another.[186]

Count 3 should not have been used to bootstrap the proof presented in counts 4 and 5. A.W. was unreliable and contradicting. Similarly, the process of borrowing evidence from count 1 was similarly fraught with unreliability. J.L. testified, as to count 1 that she initially thought that the conduct that comprised that count was an "unintentional" accident.[187] On the same day of the allegation, J.L. got into trouble at the Club for inappropriate conduct with a boy named Malik. A

[184] PA 161.
[185] PA 163. (emphasis supplied)
[186] PA 234-235. A detailed account of the unreliability of proof as to count 3 can be found at PA 234-237.
[187] PA 137.

coach named Elana and the Petitioner disciplined J.L. for her inappropriate behavior. That same day the police were summoned to investigate Petitioner.[188]

A.W., the complainant in Count 3, was also disciplined over the Malik incident, the same day the police were first called in to investigate Petitioner for claims made by all three complainants.[189] To supplant the proof necessary to sustain counts 4 and 5 both the State and the District Court improperly invoked NRS 48.045(2) and (3) to borrow proof from counts 3 through 5.[190] Use of either of these collateral evidence sections to find probable cause at a preliminary hearing undermines this court's directives in Tinch and Petrocelli.

The subject of collateral offenses or prior "bad acts" was codified under our evidence code as NRS 48.045(2).[191] Before such evidence can be admitted as proof the State must show, by plain, clear and convincing evidence that the defendant committed the collateral or bad act.[192] This procedure is used to guarantee fairness because "the use of uncharged bad act evidence to convict a defendant [remains] heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and

[188] PA 139-142.
[189] Id. See also PA 14.
[190] PA 254 and 255.
[191] Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).
[192] Id at 508, citing Tucker v. State, 82 Nev. 127, 131, 412 P.2d 970, 972 (1966)

unsubstantiated charges."[193] A presumption of inadmissibility attached to all prior bad act evidence.[194] To overcome the presumption of inadmissibility, the prosecutor must request a hearing and establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (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."[195]

None of these protections were afforded to the Petitioner mainly because this rule of evidence was never intended to facilitate supplanting proof from one count to another at the preliminary hearing level. The most important protection, that the collateral evidence be proven by clear and convincing evidence, is in direct contradiction to the probable cause quantum of evidence demanded at a preliminary hearing. It surely cannot be squared with the District Court's description of that quantum of evidence as "so slight."[196] The impact of NRS 48.045(3) recently added in 2015, cannot and should not be interpreted to allow propensity evidence as proof to charge or convict. This is illegal, unconstitutional, and in violation of all legal precedent.

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[193] Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001).
[194] Id.
[195] Bigpond v. State, 128 Nev. ____, 270 P.3d 1244, 1250 (2012).
[196] PA 265.

B. The District Court acted arbitrarily and capriciously in denying Petitioner's Motion for Expert Services Pursuant to Widdis.

In Widdis, this Honorable Court held that a criminal defendant who has retained private counsel is nonetheless entitled to reasonable defense services at public expense based upon indigency and need for the services.[197] It is incumbent upon the defense to show that the Defendant is indigent and that there is a need for the services. At the district court hearing, the Court and Counsel had this dialogue:

> Mr. Modafferi: No. Not really Judge. I don't need to – I have the case with me. I read it before I came to Court again. I know the Court last time had a Widdis motion. I was listening to the disposition. The case says that the State actually does save money when the lawyer's paid for by the family and the State pays for the ancillary investigative services or expert services.
> The Court: Well, yeah. They'd save the money of the cost to the lawyer.
> Mr. Modafferi: Yeah.
> The Court: So here, I mean, that's happened. But what I – I have to look at everything in the totality as to whether or not your client is truly indigent in order to fit the scenario under Widdis and – or the standard. And I just don't see it here. I don't reach that based on – I mean he's employed. He – it appears that he has to probably adjust his expenses. But for the State to be paying for his investigator fees under these circumstances, I don't think Widdis truly could – is saying that that's a mandatory requirement. And so I'm just making a finding based on his affidavit that he's not indigent in order to fit that.
> Mr. Modafferi: He was found indigent in Justice Court, Judge.
> The Court: I'm looking at – well, was he in custody.
> Mr. Modafferi: No. He had been released on house arrest the day –
> The Court: Okay.

[197] Widdis v. Second Judicial District, 114 Nev. 1224, 968 P.2d 1165 (1998)

Mr. Modafferi: Yeah.
The Court: Well that's – I – that might be under their affidavit. I'm not seeing it here. I'm sorry.[198]

The Petitioner had been found indigent by the Justice Court just several months prior. The need for these services had been shown to the Justice Court just several months prior. It was the use of the appointed investigator that allowed the Defense to subpoena the attendance records from the Girls and Boys Club for August 1, 2016 to demonstrate the complete implausibility of the testimony of A.W. as it pertained to Count 3. Similarly, it was the Justice Court finding of indigency which permitted the Defense to secure the testimony of Club employee Alejandra Guerrero to testify that Petitioner never came anywhere close to A.W. during the exact time that A.W. said Petitioner touched her leg.

The Defendant's hourly salary computes to $330 per week or $1,320 per month. His expenses had already been personally adjusted downward by approximately $1,400 since his last indigency determination. The Petitioner showed monthly debts to the District Court of nearly $3000. The Petitioner cannot cover approximately $1600 in his monthly expenses with his monthly salary of $1320. The District Court's determination that he does not qualify for expert services under Widdis is not supportable by the law or the facts. The decision to

[198] PA 323-324.

deny an investigator and expert services based upon indigency was arbitrary and capricious.

VII. ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Supreme Court because it involves a writ of mandamus prohibition and/or certiorari invoking the original jurisdiction of this Honorable Court pursuant to Rule 17(a)(1) NRAP and is not included or specified within Rule 17(b)(8) NRAP, also, the arguments as to Counts 4 and 5 involve Category A felonies, which by analogy, are not presumptively assigned to the Nevada Court of Appeals in post- conviction matters for a Category A felony. See e.g., Rule 17(b)(1) NRAP. Also, the two issues argued in this writ appear to be matters raising as a principal issue, a question of first impression involving both the United States and the Nevada Constitution. Rule 17(a)(13) NRAP.

VIII. CONCLUSION

Petitioner respectfully prays that this Petition be granted and that Counts 4 and 5 be dismissed and that the District Court be ordered to grant Petitioner's Motion for Expert Services Pursuant to Widdis.

Dated this 2nd day of May, 2017.

By /s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ. (12450)

IX. AFFIDAVIT OF COUNSEL FOR APPLICATION FOR WRIT OF CERTIORARI AS REQURED BY NRS 34.020.

1. Counsel for Petitioner is a duly licensed attorney authorized to practice law in the state and federal courts of Nevada and Hawai'i.
2. Counsel has drafted and reviewed the facts and arguments contained in the attached Petition and he believes the facts to be true and the arguments contained therein to be supported by law and not made either frivolously or made for delay.
3. Counsel has reviewed NRS 34.020 and in states in relevant part that, "the application (for writ) shall be made on Affidavit by the party beneficially interested..."
4. This affidavit is offered in compliance with NRS 34.020.

GARY A. MODAFFERI

Subscribed and sworn to before me
this 2nd day of May, 2017.

Notary Public, in and for said
County and State

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 4th day of May, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven B. Wolfson
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155

Adam Paul Laxalt
Nevada Attorney General
Nevada Bar #12426
100 North Carson Street
Carson City, Nevada 89701-4717

I hereby certify that in accordance with NRAP 25(1)(d) I sent true and accurate copies of the Petition for Writ of Mandamus, Or in the Alternative, Writ of Prohibition, on the 4th day of May, 2017, via United States mail, prepaid First-Class postage affixed thereto addressed as follows:

The Honorable William D. Kephart
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Erika W. Magana

An employee of
Law Office of Gary A. Modafferi, LLC