IN THE SUPREME COURT OF THE STATE OF NEVADA

COLE DUANE ENGELSON

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 82691

Appeal From A Judgment of Conviction (Jury Trial)
Fifth Judicial District Court
The Honorable Robert Lane, District JudgeDistrict
Court No. CR9226

APPELLANT'S APPENDIX VOLUME 1 OF 22

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Case No. CR9226

Department 2

The undersigned affirms that this document does not contain the social security number of any person.

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2018 NOV 27 A 11: 17

NYE COUNTY CLERK

BY _____ DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

INFORMATION

COLE D. ENGELSON,

Defendant. /

ANGELA A. BELLO, District Attorney within and for the County of Nye, State of Nevada, informs the Court that **COLE D. ENGELSON**, before the filing of this Amended Information, did then and there, in Nye County, Nevada, commit the following offense, to wit:

SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, in violation of **NRS 200.010, NRS 200.030, and NRS 193.165 A CATEGORY 'A' FELONY,** committed in the following manner, to wit: That **ON OR ABOUT JULY 15, 2017**, in Pahrump Township, Nye County, Nevada, said Defendant, without authority of law, did willfully, unlawfully, with malice aforethought kill and murder a three year old female child (DOB: January 6, 2014), a human being, with the use of a deadly weapon by beating said child to death with a cup and or bottle;

All of which is contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

NYE COUNTY DISTRICT ATTORNEY
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(775) 751-7080

Witnesses and their addresses known to the District Attorney of Nye County, State of Nevada, at the time of the filing of this Amended Information:

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DETECTIVE LOGAN GIBBS
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SERGEANT KEVIN JENSEN
NYE COUNTY SHERIFF'S OFFICE
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DWIGHT CAMP
6383 CANALOPE COURT
LAS VEGAS, NEVADA

YANCEY CAMP
6383 CANALOPE COURT
LAS VEGAS, NEVADA

DATED this 26 day of November, 2018.

ANGELA A. BELLO
NYE COUNTY DISTRICT ATTORNEY

By _____
MICHAEL VIETA-KABELL
Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
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(775) 751-7080

CERTIFICATE OF SERVICE BY MAIL

I, Juanita L. Torres, Deputy District Attorney, Office of the Nye County District Attorney, P. O. Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

AMENDED INFORMATION in
5TH JDC Case No(s). CR9226
STATE v. COLE D. ENGELSON

upon said Defendant(s) herein by delivering a true and correct copy thereof, postage prepaid, on 11.27.2018 to the following:

BRENT D. PERCIVAL ESQ.
AT THE NYE COUNTY DISTRICT ATTORNEY'S OFFICE,
IN PAHRUMP, NEVADA

Juanita L. Torres

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
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COPY

Case No. CR9226

Department 1

The undersigned affirms that this document does not contain the social security number of any person.

2019 FEB -7 P 4:22

NYE CO...

BY_____

D...

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

AMENDED INFORMATION

COLE D. ENGELSON,

Defendant. /

CHRIS ARABIA, District Attorney within and for the County of Nye, State of Nevada, informs the Court that **COLE D. ENGELSON**, before the filing of this Amended Information, did then and there, in Nye County, Nevada, commit the following offense, to wit:

FIRST DEGREE MURDER, in violation of **NRS 200.010 / NRS 200.030, A CATEGORY 'A' FELONY,** committed in the following manner, to wit: That **ON OR ABOUT JULY 15, 2017**, in Pahrump Township, Nye County, Nevada, said Defendant, without authority of law, did willfully, unlawfully, and with malice aforethought, either express or implied, kill and murder a three-year-old female child (DOB: January 6, 2014), said murder being committed during the perpetration of child abuse, to wit: by beating the child on the head and/or neck and/or body;

All of which is contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

///

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Witnesses and their addresses known to the District Attorney of Nye County, State of Nevada, at the time of the filing of this Amended Information:

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YANCEY CAMP
6383 CANALOPE COURT
LAS VEGAS, NEVADA

DATED this 7th day of February, 2019.

CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY

By _____
MICHAEL VIETA-KABELL
Deputy District Attorney

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CERTIFICATE OF SERVICE BY MAIL

I, Juanita L. Torres, Executive Legal Secretary, Office of the Nye County District Attorney, P. O. Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

AMENDED INFORMATION in
5TH JDC Case No(s). CR9226
STATE v. COLE D. ENGELSON

upon said Defendant(s) herein by delivering a true and correct copy thereof, on 2.7.2019 to the following:

BRENT D. PERCIVAL ESQ.
AT THE NYE COUNTY DISTRICT ATTORNEY'S OFFICE,
IN PAHRUMP, NEVADA

Juanita L. Torres

NYE COUNTY DISTRICT ATTORNEY
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Case No. CR9226

Department 2

The undersigned affirms that this document does not contain the social security number of any person.

FILED
FIFTH JUDICIAL DISTRICT
NOV 25 2019
DEBRA BENNETT, Nye County Clerk
Deputy

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant. /

BRIEF IN SUPPORT OF ADMITTING BAD ACT EVIDENCE

NYE COUNTY DISTRICT ATTORNEY
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COMES NOW THE STATE OF NEVADA, by and through its attorney, CHRIS ARABIA, NYE COUNTY DISTRICT ATTORNEY, through Chief Deputy District Attorney Kirk D. Vitto, and submits the attached Points and Authorities, and analysis, for consideration as the court convenes on February 24, 2020 at 3:00 p.m. for the purpose of deciding whether to admit "bad act" evidence during the upcoming trial.

POINTS AND AUTHORITIES

At the hearing scheduled for February 24, 2020 at 3:00 p.m., this court will hear from:

1. Victoria Schlick the mother of the decedent Yessenia Camp;
2. Joshua Teter (former NCSO Deputy Sherriff);
3. Kishanna Marquez;
4. Dr. John Lapore DO;
5. Detective Alexandria Fernandez; and
6. Captain David Boruchowitz.

Received
NOV 25 2019
N.C.D.A
Pahrump

NYE COUNTY DISTRICT ATTORNEY
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This Court will see the following exhibits:

1. Medical records from Kidfixers, Dr. John Lapore DO;
2. Medical records from UMC Quick Care;
3. Photograph of Yessenia, deceased, taken at Desert View Hospital by Joshua Teter;
4. Chris DeFonseka's report and analysis of the defendant's phone;
5. Photographs recovered from the defendant's phone;
6. The transcribed interview between Cpt. Boruchowitz and the defendant.

Victoria Schlick rekindled her relationship with the defendant around September 2016. They maintained separate residences until moving to Pahrump together May 1, 2017 at the address where Yessenia was found beaten and killed. Until living at the Pahrump address, 5320 East Manse Road, Victoria lived with her roommate Kishanna Marquez and her three children Nickole, Dwight, and Yessenia at a condo near Hollywood and Lake Mead. The defendant lived with a roommate, his mother, and his son near Sahara and Ft. Apache.

Between the time they began seeing one another again, and the medical report from Kidfixers, Kishanna Marquez observed the defendant dragging Yessenia through rocks while he was "babysitting" and Victoria was at work at Albertsons. Kishanna heard Yessenia screaming, she looked out the window and saw the defendant dragging Yessenia by the arm through the rocks. She confronted the defendant who explained his conduct by saying that Yessenia, the two-year-old child (at the time) had thrown a rock at him. Yessenia then cried for Kishanna who picked her up, took her into the house, and cleaned her up. Kishanna told Victoria that the defendant should not be left alone with Yessenia, that he can't handle her. The incident occurred before the December 29, 2016 visit to Kidfixers, Kishanna remembered a Christmas tree being in the residence they shared and thinks it happened just before Thanksgiving.

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This court will see the medical records from Kidfixers, as an exhibit, a pediatric office in Las Vegas, where Yessenia had been taken by her mother Victoria on December 29, 2016, documenting what appeared to be abuse, "contusions" on her legs. Victoria will tell you that she was told the injuries were from a "hard hitting beating". Dr. Lapore told her to keep an eye on Yessenia, and if Victoria saw any more bruises to bring Yessenia back and he would call authorities.

Then, on April 3, 2017 an incident occurred when the defendant was watching Yessenia, by himself, babysitting for Victoria in Las Vegas. The court will have as an exhibit, supporting medical documentation. Victoria, Yessenia's mother will explain that the defendant was home alone with Yessenia, **like in the case before the court**, that he had been drinking, **like in the case before the court**, that he had given her a shower, **like in the case before the court**, and that while brushing her hair while she was standing on the counter after getting out of the shower, **like in the case before the court**, she "fell" and injured her chin.

Former Nye County Sheriff's Office Deputy Sheriff Joshua Teter will identify and testify regarding a photograph he took of Yessenia, deceased, at Desert View Hospital. The photo depicts a very similar injury to her chin as the one sent to Victoria by the defendant, and both under very similar circumstances.

You will hear Detective Alexandra Fernandez testify that in this case, according to the defendant, Yessenia was fine when he put her in the shower, fine when she got out of the shower, he put her on the counter, began to towel her off, and she just went limp, he doesn't know what happened.

The court will see the pictures, as exhibits, of an injured, hurt, crying, distressed little girl, Yessenia, recovered by Chris DeFonseka from the defendant's phone after

Yessenia died. Victoria will describe what she knows regarding each of those photographs.

The court will hear Victoria testify that the defendant told her that he was afraid to discipline Yessenia's older brother Dwight because Dwight would call the cops on him, he told her he had so much animosity toward Dwight that he doesn't know if he would stop himself if he tried to discipline Dwight. She said he told her when he told her this that it was probably going to scare her, and she acknowledged this did scare her. She told him if he didn't let it go, she was going to leave. Captain David Boruchowitz, a Lieutenant at the time, asked the defendant about this, and the defendant told him that he didn't discipline Dwight because "I don't want to hit the kid 'cause I think I won't stop, you know." Transcribed interview (TI) page 35, lines 8, 9. Boruchowitz asked about prior discipline with Yessenia, and he recalled an incident where he had been spanking her, but he had stopped, and recalled an incident when he "Tagged her pretty good" and he "Wasn't going to spank her anymore after that. You could tell the slap you could hear it you know it was too much". Boruchowitz asked Engelson to demonstrate the force he used, and he said doesn't remember and says it might have been a "midget kick"". TI page 49, lines 2-8, page 51, line 15. He described himself as "heavy-handed", page 36, line 18. Why did Yessenia cry to go with Victoria on the day she died, instead of being left alone with the defendant, according to Victoria and the defendant? Why did Yessenia panic when Victoria left, crying, running outside when she was left alone in the house with the defendant? TI page 8, lines 20, 21, page 29, line 5, according to the defendant? This is why. This evidence explains "why", and what she did just prior to what happened resulting in her murder is *res gestae*. What happened in the past is "why" she acted the way she did

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as *res gestae*, and the evidence manifests the obvious. **This was not an accident and it was no mistake.**

NRS 48.045(2). This evidence has relevance. It is clear and convincing, supported by medical records, photographs retrieved from his own phone, the corroborating, substantiating testimony from Victoria, and the statements from the defendant himself over the course of his conversations with law enforcement. The probative value is not substantially outweighed by the prejudicial effect, **unfair** prejudice, especially when this Court has the power to limit any potential prejudice with the appropriate limiting instruction.

The defendant claims he doesn't know what happened. "I don't know anything. I don't know anything." TI Page 13, lines 15, 16. I don't know what happened at all. There's not one recollection of me even putting my hands up to her. I don't know what happened. TI page 11, lines 17-19. Although he takes responsibility, said he "did it", and described a physical fight between them, page 11, lines 14, 15, he takes the position that he doesn't know what happened, like it was an accident, saying she slipped and fell in the shower, and that "She jumped up in that green chair and she fell backwards", but didn't hurt herself, "And I said well, you keep on playing in the dirt then, you know, 'cause she - - she likes playing in the dirt." TI Page 8, lines 23, 24, page 29 lines 9-12. "She was dirtier than h - - - , so I threw her in the shower", page 8, lines 23-25, that what happened, Yessenia's death, must be a mistake because he had been drinking, "Just went too far. Right. Like I said - - and there was a lot of vodka involved...." TI page 47, lines 5, 6, resulting in the evidence sought being relevant, clear and convincing, and not unfairly prejudicial, its prejudicial impact does not substantially outweigh the probative value.

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At one point he didn't touch her then says, "I know in the bathtub I kind of like push her head back when she's trying to get out and I give her one of those little shoves, get back in there kind of things" page 30, lines 9-11, after he "threw her in the shower", and she reacted like throwing "a cat in the bathtub". Page 29, lines 16-20.

I

THE BAD ACTS SHOULD BE ADMITTED PURSUANT TO NRS 48.045(2)

NRS 48.045(2) says that:

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

The Nevada Supreme Court in *Bolin v. State*, 114 Nev. 503 (1998), interpreting NRS 48.045(2), reiterated years of case law when it set forth the standard for a court's decision-making process when considering the admissibility of prior bad act testimony. The court said that to be admissible the evidence must be relevant, clear and convincing, and "the probative value of the evidence [must not be] substantially outweighed by the danger of unfair prejudice." Id. 517. Citing the landmark case of *Petrocelli v. State*, 101 Nev. 46, 52 (1985), the court in *Bolin* said, "The trial court's determination will not be overturned absent manifest error."

Although the court in *Salgado v. State*, 114 Nev. 1039, 1043 (1998) upheld the admission of prior bad act testimony on the prosecution's offer of proof without "a formal evidentiary hearing outside the presence of the jury", the defendant is provided an extra layer of protection when the evidence sought to be admitted is heard beforehand by the court, which it will be in our case.

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The court in *Ledbetter v. State*, 122 Nev. 252 (2006) provided sound insight into the value of the "other purposes" aspect of NRS 48.045(2).

> Evidence of separate acts of pedophilia or other forms of sexual aberration are not character evidence, but are admissible for the 'other purposes' [under NRS 48.045(2)] of explaining why a crime of sexual deviance was committed. The mental aberration that leads a person to commit a sexual assault upon a minor child, while not providing a legal excuse to criminal liability, does explain why the event was perpetrated.[1]

The court in *Ledbetter*, after quoting the above, then said:

> It therefore remains the law in Nevada that 'whatever might 'motivate' one to commit a criminal act is legally admissible to prove 'motive' under NRS 48.045(2) so long as the three-factor test for admissibility is satisfied.

Ledbetter at 262. Importantly, the court then set forth facts and analysis that is pertinent, although in the instant matter we are not dealing with the sexual abuse of a child, rather the physical abuse of a small female child.

> Here, that test [the three-prong analysis] is satisfied under the particular facts of this case. What motivated Ledbetter to sexually abuse L.R. was **relevant** to the State's prosecution, and the evidence of his prior acts of abuse of T.B. and J.M. established that motive. Coming from four witnesses, T.B., T.B.'s mother, J.M., and J.M.'s mother, this prior act evidence was also shown to be **clear and convincing**. The only question remaining is whether the evidence's **probative value** was substantially outweighed by the danger of **unfair prejudice** to Ledbetter. It was not.
>
> The **probative value** of explaining to the jury what **motivated** Ledbetter, **an adult man** who was **in a position to care for and protect his young stepdaughter** L.R. from harm, **to instead** repeatedly sexually **abuse** her over so many years was **very high**.

Ledbetter at 263.

[1] *Id.* at 939, fn. 14.

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A. THE BAD ACT EVIDENCE CAN BE NARROWLY TAILORED TO AVOID PREJUDICE

The court in *Ledbetter* also gave guidelines regarding how and when to instruct the jury so that if prior bad act testimony were allowed, the trial court would have taken steps to further insulate the defendant from **unfair** prejudice. "Deficient limiting instructions are a factor this court has considered when analyzing the admissibility of prior act testimony." *Id.* at 264 fn. 21, citing *Rosky v. State*, 121 Nev. 184, 195 (2005). The trial court should give the appropriate limiting instruction prior to the testimony of each witness, "both at the time of admission and again when the case is submitted to the jury", *id.*, if the evidence is ruled admissible.

The court can rule the bad act evidence admissible without fear that it will be unfairly prejudicial. **The jury does not have to hear everything or nothing. They can be allowed to hear enough without hearing too much.**[2] Defendant is insulated from prejudice, not only by the hearing he will receive, not only by narrowly tailoring the evidence for admission, but by prophylactic jury instructions that we know the jury is presumed to follow.[3]

> We are also convinced that a limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury. As one leading commentator has stated:
>
> [An instruction given at the time of admission] can be directed specifically at the evidence in question and can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose. Instructions given at the end of the case will be more abstract, may apply

---

[2] It is the position of the prosecution that because Defendant bears no burden, that he can literally do nothing, and that because he is insulated from prejudice by instruction to the jury about the State's burden, that he is cloaked with innocence until proven guilty, and that the jury is to draw no negative inference from a refusal to testify should he elect to exercise that right, the prosecution must therefore be allowed to present this evidence to a jury.

[3] *State v. Hall*, 54 Nev. 213 (1932).

> to a number of items of evidence, and are buried in a mass of other instructions.
>
> Therefore, to maximize the effectiveness of the instructions, we hold that the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial reminding the jurors that certain evidence may be used only for limited purposes.

Tavares v. State, 117 Nev. 725 at 733 (2001).

B. REQUIRING PREJUDICE TO SUBSTANTIALLY OUTWEIGH THE PROBATIVE VALUE IMPLICITLY FAVORS ADMISSIBILITY

The federal rules governing the admission of bad act evidence are helpful to the determination this court will have to make. Under Federal Rule 413, bad act evidence may be excluded pursuant to Rule 403 if "the probative value of evidence is 'substantially outweighed by the danger of unfair prejudice.'" *U.S. v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001). **The fact that a defendant's case will be harmed by the admission of certain evidence does not constitute unfair prejudice.** *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir. 1977) ("Evidence relevant to a defendant's motive 'is not rendered inadmissible because it is of a highly prejudicial nature....The best evidence often is.'") (quoting *United States v. Mahler*, 452 F.2d 547 (9th Cir. 1971); *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989) (probative force outweighs prejudice where prior conviction has a "clear logical connection" to the issue of knowledge and intent in instant case). In *Spillone* the court recognized the efficacy of admitting bad acts saying, "Frequently, evidence of intent is circumstantial and less strong than it might be. Under these circumstances, courts permit the introduction of prior crimes. *See* United States v. Harrod, 856 F.2d 996, 1001 (7th Cir. 1988); United States v. Scott, 767 F.2d 1308, 1311 (9th Cir. 1985)." *Id.* While evidence of prior

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sexual acts [like child abuse causing death and prosecuted as First-Degree Murder] will always be "emotionally charged and inflammatory," courts must keep in mind that the allegation that the defendant committed the charged crimes will be just as inflammatory. *LeMay*, at 1030. Thus, the mere fact that the prior child abuse evidence is inflammatory is not dispositive.

Under Nevada law, relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice...." NRS 48.035. While the context of this rule is nearly verbatim with Fed. R. Evid. 403, substantive state court decisions which explain how to apply the rule have been somewhat lacking. In *Lay v. State*, 110 Nev. 1189, 1196, 886 P.2d 448 (1994), the court took note that "Other state and federal courts have found gang-affiliation evidence relevant and not substantially outweighed by unfair prejudice when it tends to prove motive. *See* United States v. Rodriguez, 925 F.2d 1049, 1053-54 (7th Cir. 1991); United States v. Silverstein, 737 F.2d 864, 866-67 (10th Cir. 1984); People v. Dominguez, 121 Cal. App. 3d 481, 175 Cal. Rptr. 445, 455-56, (Ct. App. 1981); People v. Connally, 105 A.D.2d 797, 481 N.Y.S.2d 432, 433 (App. Div. 1984). As stated, the evidence at issue was relevant to prove that Lay had a motive to engage in the shooting of rival gang members. We conclude that the evidence was not unfairly prejudicial." The court in *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061 (1997) agreed with *Lay* in the face of the defense argument that allowing evidence of gang affiliation would inflame "the passions of the jury to convict a man based upon his status as [a] gang member." The court disagreed with the defense position and allowed the evidence to be presented.

More recently, the Nevada Supreme Court has elucidated the proper application of this rule. The court recently explained that "unfair" prejudice is that

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which appeals to "the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." *State v. Eighth Judicial Dist. Ct. of Nevada (Armstrong)*, 127 Nev. 927, 267 P.3d 777, 781 (2011). However, just because evidence is emotional is no basis to exclude it under the rule. Rather, to be excluded the evidence must tend "to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.", citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Such grounds could include "bias, sympathy, anger, or shock"). *Id.* Regardless, the plain language of NRS 48.035 "implies a favoritism toward admissibility", *Holmes v. State*, 129 Nev. 567, 306 P.3d 415, 420 (2013), by requiring that the prejudicial impact *substantially outweigh* the probative value. The court in *Holmes* said:

> "But '[a]ll evidence offered by the prosecutor is prejudicial to the defendant; there would be no point in offering it if it were not.' United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991). The real question is whether the lyrics' probative value was substantially outweighed by the danger of *unfair* prejudice. NRS 48.035; *see* Schlotfeldt v. Charter Hosp. of Las Vegas, 112 Nev. 42, 46, 910 P.2d 271, 273 (1996) (the 'substantially outweigh' requirement 'implies a favoritism toward admissibility'). Evidence is 'unfairly' prejudicial if it encourages the jury to convict the defendant on an improper basis. State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. __, __, 267 P.3d 777, 781 (2011)." *Id.*

Applied to the instant facts, California's similar rule considers how recent the prior offense was, its similarity to the charged offense, the likely prejudicial impact, the burden on the defendant in defending against the uncharged offense, and whether less prejudicial means of presenting the information exist. *People v. Loy*, 52 Cal 4th 46, 61, 254 P.3d 980 (2011). In this case the bad acts the State seeks to use are recent, and one them, the incident involving the chin, is not only strikingly similar, but well documented.

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II

IRRESPECTIVE OF WHETHER THE DEFENDANT TESTIFIES, IF, WHILE PRESENTING A CASE-IN-CHIEF THE DEFENSE OPENS THE DOOR FOR THE PRESENTATION OF OTHERWISE EXTRINSIC, COLLATERAL, OR BAD ACT EVIDENCE, THE STATE WILL SEEK PRESENTATION OF ANY BAD ACT EVIDENCE PRECLUDED IN ITS CASE-IN-CHIEF AS SUBSTANTIVE EVIDENCE FOR THE PURPOSE OF REBUTTAL

The court in *Jezdik v. State*, 121 Nev. 129 (2005) reviewed application of the "collateral fact rule". "Under this doctrine, 'it is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter.' Facts are collateral if they are 'outside the controversy, or are not directly connected with the principal matter or issue in dispute.'" *Jezdik* at 136, 137. "However, authorities have noted an exception to the collateral-fact rule when the State 'seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused's direct examination.'" *Id.* 138. "Under this exception, the defendant's false statements on direct examination trigger or 'open the door' to the curative admissibility of specific contradiction evidence." *Id.* To support where they were going the court quoted "Chief Justice Burger's rationale in *Harris v. New York*:

> 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, [appellant] was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.'

Id. 139. The court pointed out that the position taken was not without precedent, "Similarly, in *Bostic v. State*, we held the admission of specific contradiction evidence proper when the defendant testified in his own defense. We stated in *Bostic* that testimony for 'the purpose of contradicting [the defendant's]

testimony is clearly distinguishable from the use of specific acts of misconduct to impeach the accused's character or credibility."

Id.

The court concluded:

> We cannot pervert the shield provided by NRS 50.085(3) into a license for a defendant to purposefully, or even inadvertently, introduce evidence giving the jury a false impression through an absolute denial of misconduct and then frustrate the State's attempt to contradict this evidence through proof of specific acts. As a result, we adopt a limited exception to the collateral-fact rule and hold that our statutory rules of evidence do not prohibit a party from introducing extrinsic evidence specifically rebutting the adversary's proffered evidence of good character.

Id.

CONCLUSION

The court in *Tavares v. State*, 117 Nev. 725 at 733 (2001) said,

> Turning to the facts of this case, we note that Tavares's conviction rested primarily on circumstantial evidence as there was no clear direct evidence showing Tavares's actions. Instead, the State relied greatly on Tavares's prior bad acts, inconsistencies in Tavares's story, and the perceived callousness in his statements made after the incident. We have little doubt that in the absence of an instruction on the limited use of the evidence, Striggles's testimony regarding Tavares's previous rough handling and occlusion of their baby had a prejudicial impact on Tavares's trial rights and impermissibly tainted the jury's verdict.

The conviction in Tavares was reversed because a limiting instruction was not given to the jury regarding how to use the evidence.

To simply say that the acts before the court are too prejudicial is an anemic posture to adopt. The jury would then be subject to having to decide the matter in a vacuum, a vacuum that a law was specifically enacted to fill in the manner sought. It has been said that nature abhors a vacuum and will seek to fill it. If this evidence is not allowed, a truth vacuum will be created that can be quite costly in a system where

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truth can hang so delicately in the hands of human beings and the balance of circumstance. It seems that juries, like nature, abhor vacuums, and as a result "reasonable doubt" can creep into places it should not be allowed when the prosecution has legally admissible evidence to properly fill the vacuum otherwise left for a jury to ponder.

Jury trials are not scripted; the participants are not actors being directed along a preconceived path toward a predetermined conclusion. This is real life. Real life can be gritty. In an oyster it is the grit that defines and produces the pearl. If the evidence should be admitted, it should be admitted, and the chips left to fall where they may.

At the conclusion of the bad act hearing, this court must decide what, if anything, should be admitted at trial. If the court determines that none of the evidence is admissible in the prosecution's case-in-chief, it could still be considered admissible as part of a rebuttal case should circumstances so dictate. If at any point bad act evidence should be allowed, this Court must give an instruction to the jury before the evidence is heard, and that instruction should be made part of the final instructions to the jury.

At the hearing, at the conclusion of the evidence, the prosecution will be arguing the admissibility of the evidence to manifest the defendant's "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The defendant is claiming no knowledge of what occurred, or that maybe the victim's death was the result of falling from a chair, or slipping in the shower, such that her death was a "mistake" or an "accident". Another "other purpose" in this case would be to help the jury understand the incomprehensible, why a crime of child abuse

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would or could be committed, "the mental aberration that leads a person to commit a [crime of child abuse], while not providing a legal excuse to criminal liability, does explain why the event was perpetrated."

It is as wrong that the guilty be acquitted as it is for the innocent to be convicted[4]. Faimess is not giving to each side equally, or in a "some for you, some for you fashion". Fairness, justice, is giving to each deservedly, according to the law.

The State is asking that this court allow the jury to see and hear, with the appropriate limiting instruction:

1. The photos recovered from the defendant's phone with Victoria's explanation of when and where they were taken, and what the defendant himself told her about them;
2. The photo taken by Joshua Teter along with his explanation;
3. Kishanna Marquez for what she saw and heard, and when and where the incident occurred;
4. Dr. John Lapore, DO, his medical records and observations; and the
5. UMC Quick Care medical records.

DATED this 21 day of November, 2019.

CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY

By _____
KIRK D. VITTO
Chief Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
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[4] "A prosecutor seeking admission of this volatile evidence must do so in the pursuit of justice and as a servant of the law, 'the twofold aim of which is that guilt shall not escape or innocence suffer.'" *Tavares v. State*, 117 Nev. 725 at 731 (2001).

CERTIFICATE OF SERVICE

I, Renne McKeen, Executive Legal Secretary, Office of the Nye County District Attorney, Post Office Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

MOTION FOR HEARING DATE AND REQUEST TO HEAR BAD ACT EVIDENCE PRETRIAL in 5TH JDC Case No. CR8407 STATE v. ERNEST HARVEY GOODSON

upon said Defendant herein by personally delivering a true and correct copy thereof on 11/25/19 to the following:

BRENT PERCIVAL

Renne McKeen

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

COPY

FILED
FIFTH JUDICIAL DISTRICT
FEB 10 2020
Nye County Clerk
DEBRA BENNETT Deputy

Case No. CR9226

Department 2

The undersigned affirms that this document does not contain the social security number of any person.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

v.

COLE D. ENGELSON,

Defendant. /

NOTICE OF MOTION AND MOTION FOR DEPOSITION

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

TO: Cole D. Engelson, Defendant

AND TO: Nye County Public Defender Brent Percival, Attorney for Cole D. Engelson

COMES NOW, Plaintiff **THE STATE OF NEVADA,** by and through its attorney, CHRIS ARABIA, NYE COUNTY DISTRICT ATTORNEY, and moves this Court to Order the deposition of one State's witness, hereinafter referred to simply as "Witness", and that counsel for Defendant Cole D. Engelson, have a full and unfettered opportunity for cross-examination. The State requests that this court order the deposition of Witness within sixty days from the date of this Motion, and that the State be ordered to disclose the names of the witness no later than thirty days prior to the date of the ordered deposition so that defense counsel will have a full and fair opportunity to adequately prepare for effective cross-examination. This Court should

also Order the State to disclose any benefit provided the Witness in exchange for his willingness to divulge information he had relevant to the case and thereafter testify accordingly.

NOTICE IS HEREBY GIVEN that the undersigned will bring on the above Motion for hearing before the above-entitled Court in the courtroom of the Nye County Courthouse, Pahrump, Nevada, at the previously set status check currently set for March 9, 2020 at 9:00 a.m., or as soon thereafter as counsel may be heard.

This motion is based on all papers and pleadings herein, the attached Points and Authorities and any arguments adduced by counsel at the hearing of this matter.

DATED this 10th day of February, 2020.

CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY

By _____
KIRK D. VITTO
Chief Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
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FACTS

The defendant is facing a serious murder charge related to the murder of a three-year-old child. The State has received information from a witness relative thereto. Over the course of these proceedings the witness's whereabouts have been unknown. Although his location is currently known, that could change. The witness may be fearful of reprisal.

The State has taken steps to ensure the veracity of the information provided by matching the information provided to the known and established facts and evidence.

The State has concern that due to safety concerns the witness may have, that a protracted trial date may incentivize the witness to absent himself from the jurisdiction.

Due to concerns regarding the witnesses safety, appearance, and legal constraints in that regard that include *Crawford*, and hearsay, it is in the best interests of justice that this court order the deposition of the witness whose name will be timely disclosed to defense counsel, giving defense counsel adequate opportunity to prepare an effective cross-examination, and giving the State opportunity to take necessary steps to protect the witness.

POINTS AND AUTHORITIES

NRS 174.175 says that a deposition may be taken of a witness in a criminal proceeding when

> ...it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information or complaint may upon motion of a defendant or of the State and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the deposition is taken upon motion of the State, the court shall order that it be taken under such conditions as will afford to each defendant the opportunity to confront the witnesses against him.

The State has brought this motion, the parties have been noticed, all relevant evidence has been disclosed pursuant to discovery, and the Defendant will have his Sixth Amendment right to confront witnesses respected and protected. Out of concern that the witness(es) "may be unable to attend or prevented from attending", and because the testimony he can provide is "material", "it is necessary to take his deposition in order to prevent a failure of justice". The Defendant has the right to confront the witness, which will be respected, protected, and preserved by the deposition process, and the State has the right to avail itself of this process to

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preserve the integrity of the system by documenting evidence that could be lost due to intimidating tactics and/or fear of reprisal for having cooperated with law enforcement.

CONCLUSION

For the reasons asserted, the State hereby requests that this court order the deposition of the witness whose name will be disclosed to the Defendant 30 days prior to the deposition date. It cannot be gainsaid that there is a legitimate reason to oppose this request, or for this request to be denied. The deposition process can only aid the defense in their best effort to protect the rights of the Defendant by having the opportunity to cross-examine the witness who has given previous statements provided as discovery.

A deposition also provides a mechanism to preserve material information should the witness be unable to testify at some point in the future.

The court should order that the deposition be taken pursuant to NRS 174.205, that "A deposition shall be taken in the manner provided in civil actions." As in the Eubanks/Jackson murder prosecution, the Prosecution requests that the "deposition" be conducted in Your Honor's courtroom with all court personnel present, as if the witness was testifying at trial.

DATED this 10th day of February, 2020.

CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY

By _____
KIRK D. VITTO
Chief Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

CERTIFICATE OF SERVICE

I, Renne McKeen, Executive Legal Secretary, Office of the Nye County District Attorney, P.O. Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

NOTICE OF MOTION AND MOTION FOR DEPOSITION in
Case No. CR9226
STATE v. COLE D. ENGELSON

upon said Defendant, COLE D. ENGELSON, herein by delivering a true and correct copy thereof on 2/10/2020 to the following:

BRENT PERCIVAL
at the Nye County District Attorney's office
in Pahrump, Nevada

Renne McKeen

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

Case No. CR 9226

Dept. No. 2P

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

-v-

COLE DUANE ENGELSON,

Defendant.

/

ORDER SETTING HEARING

Setting date for hearing on 3-23-20 @ 11:00 a.m.

Good cause appearing therefore,

IT IS ORDERED that the above-captioned matter be and the same hereby is set for hearing on Defendant's Motion for Pro/Se Self Representation filed February 28, 2020, and resetting Status Hearing, vacating March 9, 2020 and resetting to commence at 11:00 a.m. on Monday, March 23, 2020, in Pahrump, Nevada.

DATED this 5th day of March 2020.

DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA AND NYE COUNTIES

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 5th day of March 2020, she mailed copies of the foregoing ORDER to the following:

NYE COUNTY DISTRICT ATTORNEY
1520 E. BASIN AVE.
PAHRUMP, NV 89060
(HAND DELIVERED)

BRENT D. PERCIVAL, ESQ.
3340 S. HWY 160, SUITE 202
PAHRUMP0, NV 89048
(HAND DELIVERED)

COLE D. ENGELSON #1370569
NYE COUNTY DETENTION CENTER
1521 E. SIRI LANE
PAHRUMP, NV 89060
(FLEET DELIVERED)

Louise Mulvey
LOUISE MULVEY, Secretary to
DISTRICT JUDGE

IN THE FIFTH JUDICIAL DISTRICT COURT

COUNTY OF NYE, STATE OF NEVADA

BP

Cole D. Engelson

DEFENDANT

VS

THE STATE OF NEVADA

PLAINTIFF

Case # Ce 9226

DEPT # 2

FILED
FIFTH JUDICIAL DISTRICT
FEB 28 2020
Nye County Clerk
Deputy

DEFENDANTS FORMAL REQUEST FOR PRO/SE, SELF REPRESENTATION

Comes Now, Cole D. Engelson, Defendant in the above Titled Case, and brings forth the following formal REQUEST Upon this Court to allow defendant to Proceed Pro/se as he has a Constitutional Right outlined here in.

Background

This is a Capital Case that Stems from July 2017 in Nye County NEVADA that Resulted in a death. Since July 2017 defendant, Cole D. Engelson has been represented by The Nye County Public Defenders who have Committed UNETHICAL And Bias Acts against their Client. Said Acts are Supported by facts of Evidence

that leads this Defendant to feel More Secure in his Personal Defense in this Case.

· Argument ·

As Courts have noted, The United States Constitution's Sixth Amendment Right to Effective assistance of Counsel, Entitles Defendant Engelson to the undevided Loyalty of his Counsel.
Defendant Engelsons Counsel of Record has in True fact Proven beyond Any Doubt and Any Amount of Deniability that his Loyalty is Devided against his Client.

Attorney of Record, Brent D. Percival has in true fact withheld Previous Plea Bargain information from his Client.
See: Transcript of Proceedings October 14th 2019 · 10:35 Am ·
Page # 13 Line # 19-25

Attorney Percival Details on line # 24 An Offer From the State for a Second Degree Murder And A Recommendation of a "Ten To Twentyfive" Year Sentence.
At No time was this "Deal" Presented to Defendant Engelson to Consider and this Deal May have

been Acceptable, if it was Presented.
Attorney Percival has Recanted this Statment to his Client and Stated this offer was Never MADE.

2. Attorney of Record Brent D. Percival has argued with his Client, Defendant Engelson, over matters of Law resulting in Counsel Brent D. Percival giving Defendant Engelson Caselaw that outlined the Subject of Said Argument.
The Caselaw Provided by Attorney Percival Clearly proves Defendant Engelsons Argument, and if Attorney Percival would have taken a Brief moment to Look at Said Caselaw, OBVIOUSLY USED In Another Case; he would have Realized his mistake.
This Argument has Continued for over a Year and Even after Said Argument being Cleared up By District Court Judge Robert Lane, Attorney Percival Continued to Argue with Defendant Engelson Even Stating Judge Lane to Be "incompetent" and Does Not Know the law.

3. After Numerous attempts to Convince Defendant Engelson to take a Plea Baggain Presented by the State, Attorney of Record Percival Proceeded

To Call and Harrass Defendant Engelsons mother
without Defendant Engelsons Consent.
Attorney Brent D. Percival used unethical
Practices and Violated Attorney Client Privilege, 3
Days in A Row, Relentlessly, attempting to Get
Defendant Engelsons mother to Convince Engelson
into taking a Deal.
Attorney Acted Beyond Ethics And without his
Clients Consent And MADE Said Calls to Defendants
mother on the following Dates and times:

· Call Details ·

January 6th 2020 To: 702-439-6317
From: 775-727-9504

January 7th 2020 To: 702-439-6317
From: 702-499-5402

January 8th 2020 To: 702-439-6317
From: 702-499-5402

Defendant Engelson Brings forth Facts that
Said trade Practices of Attorney Percival are in
No Way Beneficial to a Defense, but are only
beneficial to Attorney Percival and the Prosecution.
Defendant Engelson Supports these facts by

Exhibit Evidence And Affidavit of Defendants mother available by Request.

The SIXTH Amendment Right Provides that, "In all Criminal Prossecutions, The Accused Shall have the right to have the Assistance of Counsel For his Defence".

Defendant Engelson beings attention to "Assistance of Counsel", And that No where in the Constitution is theee Any Expression of being Subject to forced And unethical Decisions of a Conflicted and daviant Bias Counsel.
As Clearly Stated within the SIXTH And Fourteenth Amendments, Rights Secured And Protected by A Defendant as Safe Guards and Guidelines Put in Place to Prohibit Said Acts of ineffective And unethical Counsel.

Defendant Engelson, MAKES A Clear Claim against his Counsel Brent D. Percival As violating the "fundamental fairness" of his Court PROCEEDings And violating DUE PROCESS And Equal Protection of ETHICAL LAW

TEMPORARY WAIVER OF RIGHT To Counsel

Defendant Cole D. Engelson here by Declares his wish to Proceed Pro/se temporary while in the Scheduled (Pre Trial Proceedings Only) and that this Court appoint temporary Stand by Counsel to aid Defendant in the Navagation And Proceedures of the Court.

Defendant Engelson declares and takes Notice that A waiver of A Right to Counsel Can occur throughout Any of the many Stages of the Ceiminal Justice Processes And Stands on His Right to waive Counsel As a Temporary Status with Standby Counsel to openly address issues and fully utilize Constitutional Processes of Law.

Defendant Engelson wishes to Keep Standby to Ensure his Rights are kept Whole and Not violated

Defendant Requests the following:

(1) This Court Grant Defendant Pro/Se Status

Temporary for Pre Trial Stage Only.

(2) This Court Approve Standby Counsel to Aid Defendant in Secveity of Rights, and Aid in Criminal Proseduces as well as local Court Rules.

(3) This Court issue An Order to Revoke Pro/se Status at the Beginning Of the TRIAL AND Reappoint Counsel.

Conclusion.

Defendant Engelson Prays this honorable Court Grant his Request without Any Delay And Allow him to Proceed Pro/se, with Standby Counsel.

Defendant Engelson understands this Court may Not be aware of Attorney Peccivals unethical actions And Defendant would Not object to an evidentuary hearing to adress these issues where Defendant Engelson is Prepaired to Provide Exhibits And Affadavits in Support of his Claim.

Appcoved Denied

Hearing Scheduled on: TBD

Respectfully Submitted,

Coie D. Engelson
Pro/se Defendant

DATE: Day of Febuary 2020

- AFFIDAVIT -

I Cole D Engelson Defendant in this matter here by Certify Under Penalty of perjury that all information in this Motion is true and Correct to the best of my ability.

Signed Cole D ENGELSON on this 25th Day of February, 2020

Respectfully,

X Cole Engelson
DEFENDANT

1521 E Sir. LN
Pahrump NV 89060

- CERTIFICATE OF SERVICE -

On February, 2020, Defendant in the enclosed matter did in true fact place in Outgoing Legal Mail at the Nye County Detention Center 2 Copies of the following Document:

I Swear Under Penalty of perjury that these documents Were Mailed to the following ADDresses:

Nye County Clerks office
1520 E. Basin AVE #108
Pahrump NV 89060

Case No. CR 9226
Dept. No. 2P

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,
-v-

COLE DUANE ENGELSON,

Defendant.
_____/

ORDER APPOINTING COUNSEL

On the 28th day of February 2020, COLE DUANE ENGELSON, having submitted a Motion for Withdrawal of Attorney of Record, said Motion having been granted in court on the 23rd of March 2020, and good cause appearing, therefor,

IT IS HEREBY ORDERED that RONNI N. BOSKOVICH, ESQ., 3190 S. HWY. 160, SUITE H, PAHRUMP, NV, 89048, (702) 583-3079), and DANIEL MARTINEZ, ESQ., 3190 S. HWY. 160, SUITE H, PAHRUMP, NV, 89048, (702) 625-0610, be and hereby are appointed to represent the Defendant in the above-referenced matter.

IT IS FURTHER ORDERED that a hearing is scheduled on April 06, 2020 at 9:00 a.m, on the State's motion for deposition.

IT IS FURTHER ORDERED that the preceding counsel immediately transfer any and all pleadings to the appointed counsel.

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Pursuant to NRS 239B.030, the undersigned affirms this document does not contain the social security number of any person.

DATED this 30th day of March 2020.

DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA AND NYE COUNTIES

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA AND NYE COUNTIES

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 30th day of March 2020, she mailed (or hand/fleet delivered) copies of the foregoing ORDER APPOINTING COUNSEL to the following:

NYE COUNTY DISTRICT ATTORNEY'S OFFICE
1520 E. BASIN AVE., SUITE 107
PAHRUMP, NV 89060
(HAND DELIVERED)

DANIEL E. MARTINEZ, ESQ.
552 E. CHARLESTON BLVD.
LAS VEGAS, NV 89104
(HAND DELIVERED)

RONNI BOSKOVITCH, ESQ.
3190 S. HWY. 160, SUITE H
PAHRUMP, NV 89048
(HAND DELIVERED)

BRENT D. PERCIVAL, ESQ.
3340 S. HWY 160, SUITE 202
PAHRUMP0, NV 89048
(HAND DELIVERED)

Nancy L. Oratty for:
Louise Mulvey, Secretary to
DISTRICT JUDGE

Case No.: CR9226

Dept. No.: 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant.

DEFENDANT COLE D. ENGELSON'S OPPOSITION TO BAD ACT EVDIENCE

COMES NOW, the Defendant, COLE D. ENGELSON, by and through his Public Defenders, Daniel E. Martinez, Esq. and Ronni N. Boskovich, Esq., and submits his Opposition to Bad Act Evidence.

This Opposition is made and based upon the papers and pleadings on file herein, the Points and Authorities which follow, and any arguments of counsel entertained by the Court at the Hearing.

DATED this 29th day of April, 2020.

Daniel Martinez Law, LLC

Daniel E. Martinez, Esq.
Nevada Bar No.: 12035

POINTS AND AUTHORITIES

FACTS AND PROCEDURAL HISTORY

Cole Engelson is accused of murdering his girlfriend's three (3) year old daughter, Yessenia Camp, by abusing her so badly she suffered fatal injury. Engelson does not know what happened to the little girl the night she died because he was too intoxicated. He suspects she may have incurred the injuries by falling while he gave her a shower before bed.

The State seeks to introduce evidence of alleged prior bad acts involving the alleged abuse of the victim by Engelson. Specifically, the State wishes to introduce three alleged incidents of child abuse against Yessenia that were never charged. Further, none of these prior events were reported to child protective services ("CPS") or the police, and there is no documented evidence of any acts of child abuse occurring. The introduction of this evidence only seeks to inflame an emotional response in the jury to cause them to convict the Defendant on the notion that he is a bad person. It has no probative value to the case. The incidences alleged are not close in time to the death of Yessenia, nor do they show any particular pattern by the Defendant.

One prior alleged bad act the State seeks to introduce involves testimony from a former roommate claiming in Fall 2016 she heard Yessenia screaming then witnessed Engelson "drag" Yessenia through the rocks after Yessenia threw a rock at Defendant. As such, it appears the Prosecution seeks to admit evidence of a parental figure's reaction to a toddler's tantrum as evidence that Defendant is a murderer. On its face this allegation is substantially prejudicial because it is not close in time or pattern to the events of this case, it has no probative value to this case at all, and even if factually true, would not be a crime. As such, a *Petrecelli* hearing is not even required to determine the admissibility of this allegation. It is simply inadmissible.

The subsequent events the Prosecution seeks to introduce both allegedly resulted in injuries that were treated by a mandatory reporter, a medical professional, who on neither occasion felt it necessary to disclose potential danger to law enforcement and/or CPS. Engelson and Victim's Mother, Victoria

Schlick, support corporal punishment in disciplining children. The victim's siblings testified their mother punishes them by spanking. Nobody has ever reported Engelson or Schlick to CPS or the police regarding allegations of child abuse. There is no routine documentation suggesting medical professionals or anyone else alleged child abuse when the children sought treatment for an injury.

The injuries are not similar, and the manner in which the injuries were alleged to have incurred are not similar. In one instance, Engelson engaged in corporal punishment against Yessenia that was rubberstamped by her own mother. In the other alleged incident, Yessenia fell and injured herself just after a shower. An injury during a certain routine or time of day does not show a pattern or motive even by the loosest definition. As further discussed below, when analyzed under the law in Nevada, the prior bad acts the State seeks to admit do not fall into any exception, are substantially more prejudicial than probative, and should be excluded with or without a *Petrecelli* hearing.

LEGAL ARGUMENT

Nevada Revised Statute 48.045(2) provides that 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 only allows for admission of this type of evidence for limited other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. NRS 48.045(2).

These exceptions are merely that to the presumption that uncharged bad acts are inadmissible. *Tavares v. State*, 117 Nev. 725, 731, (2001). In fact, the use of uncharged bad act evidence to convict a defendant is **heavily disfavored** in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. *Id.* at 730. Admitting prior bad act evidence unduly influences the jury to convict the accused on the belief that he is a bad person. *Id.*

In order to overcome the presumption of inadmissibility, the prosecutor must establish outside of the presence of a jury that: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, (1997). Further, "a prosecutor seeking admission of this volatile evidence must do so in pursuit of justice," and "refrain from improper methods calculated to produce a wrongful conviction." *Tavares v. State*, 117 at 731.

This requires a prosecutor to clearly state the exception under which they seek to admit prior bad act evidence. This is implied in the requirement that the court give a limiting instruction explaining to the jury with specificity the purpose for admission of prior bad act evidence. *Tavares*, 117 at 733. Therefore, if a specific, articulable, exception does not exist, it is because the prosecution is attempting to admit prior bad act evidence improperly, and the Court should deny the State's request to admit it.

The Prosecution's Motion does not clearly articulate an exception to admit Defendant's alleged prior bad acts under, and as such, the Motion should be denied outright as presumptively inadmissible under the rules. However, if the Court were to entertain the Prosecution's request to admit the prior bad acts under the vague category of "other purposes," we then turn to the State's comparison and reliance on the Nevada Supreme Court's decision in *Ledbetter v. State*, 122 Nev. 252, (2006).

In *Ledbetter*, the Court did not do a blanket evaluation of admitting bad act evidence for "other purposes." The State sought to introduce prior bad acts of alleged sexual abuse that Defendant was never charged with under several named exceptions, and the Nevada Supreme Court in *Ledbetter* identifies and rejects each potential exception except motive and common scheme or plan. *Id.* at 260. Notably, in their Motion, the Prosecution does not attempt to argue the admission of the prior bad acts of this Defendant under the common scheme or plan analysis, so this Memorandum will examine what may be the State's contention that the prior bad acts allegations should be admitted under the motive exception, like in *Ledbetter*.

In *Ledbetter*, the Defendant was accused of sexual abuse crimes against a child. *Id.* The *Ledbetter* Court determined that motive could be a valid basis for admission of prior act evidence in child sexual abuse prosecutions to show a defendant's attraction to or obsession with his victims. *Id.* at 262. The Court went on to describe the mountains of evidence of routines and patterns of years-long sexual abuse by that defendant specifically that supported admission of the evidence as motive in that case only. *Id.* The Court specifically warned that in cases not involving sexual abuse use of such prior act evidence should not be used to bolster otherwise relatively weak charges, which heightens the likelihood of unfair prejudice. *Id.* at 263. The Court went on to warn that other courts should not apply *Ledbetter*'s reasoning in any other circumstances outside of sexual abuse cases and emphasizes a need to evaluate the admission of evidence of prior acts on a case-by-case basis after a thorough analysis of the specific facts. *Id.*

This case is more factually analogous to *Tavares v. State*, 117 Nev. 725, (2001), which the State unsurprisingly attempts to breeze by. In *Tavares*, like in this case, the State's theory was that the Defendant had a history of mishandling the victim, and therefore caused her death. *Id.* at 728. The Court allowed the State to present prior bad acts evidence regarding a handful of unreported, alleged incidents of child abuse over the years. *Id.* Further, the State only had circumstantial evidence to prove its case in chief that Defendant murdered the child. *Id.* The jury, after hearing the unreported, uncharged allegations of child abuse, convicted Defendant. *Id.*

The Nevada Supreme Court reversed due to the lack of a limiting instruction to the jury and cautioned that the "conviction rested primarily on circumstantial evidence," and "the State relied greatly on Tavares's prior bad acts..." *Id.* at 733. The Court went so far as to admonish the prosecution that if they are to seek admission of this volatile evidence it "must do so in the pursuit of justice," and "refrain from improper methods calculated to produce a wrongful conviction..." *Id.* at 731.

Here, admitting evidence of three uncharged, uninvestigated, alleged prior acts of child abuse will be substantially more prejudicial than probative, and the Court does not even require a *Petrecelli*

hearing to make this determination. First, the State cannot name an exception for admitting the evidence because they do not have one. The State has not analyzed and argued the evidence is admissible under a single permissible exception. The evidence cannot be admitted under "other purposes" when the purpose is actually to admit the evidence to prove exactly what is prohibited by the law. Because the State does not have a proper purpose for admitting the evidence, their request should be denied.

Next, the State's argument that the evidence should be admitted because the case is similar to the circumstances in *Ledbetter*, and in *Ledbetter* the prior bad acts were admitted to show "other purposes" is incorrect and unpersuasive. Notably, what the State presents as the Court's analysis of "other purposes" is really a discussion on the exception of Motive. That is where *Ledbetter* is so distinguishable from our case it is written into the text of the opinion. *Ledbetter* allowed for the admission of the prior bad acts because of the Court's position in that case that someone with a propensity to commit child sexual abuse acts has a mental defect. Put more succinctly in the Dissent of that case, "evidence of prior sexual acts is permitted to...show that he is a pervert." *Ledbetter*, 122 Nev. at 267 (Rose, C.J. dissenting).

The State briefly mentions absence of mistake or accident as a possible purpose for admitting the prior bad acts, but does not meet the low burden under that exception. The admissibility of evidence of other crimes, wrongs, or acts to establish absence of mistake or accident is well established, particularly in child abuse cases. *United States v. Harris*, 661 F.2d 138, 142 (10th Cir. 1981). This is because "proof that a child has experienced injuries in **many purported accidents** is evidence that the most recent injury may not have resulted from yet another accident." *Bludsworth v. State*, 98 Nev. 289, 292, 646 P.2d 558, 559 (1982) (emphasis added). The State has reference as **single** accidental incident in which Yessenia was injured, falling off the counter after her shower. Under existing law, a single incident is not probative of absence of mistake or accident, it takes **many purported accidents** to reach that burden, and the State has not done so.

As such, this Court should expressly reject the reasoning in *Ledbetter* in this case, and should instead look to the Court's warnings in *Tavares* for guidance on whether or not to admit prior bad acts in this case. The facts in *Tavares* mirror our case so closely the Court has no choice but to heed its warnings. Admission of testimony regarding less than a handful of alleged incidents of child abuse that are not close in time to the events of this case, nor are they factually similar, are substantially more prejudicial than probative to a defendant. They will cause a jury to convict defendant on the belief he is a bad person as opposed to holding the State to its burden to prove **this case** beyond a reasonable doubt.

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CONCLUSION

The State seeks to admit this evidence for an improper purpose calculated to achieve a conviction, as is expressly cautioned against in *Tavares*. The State complains it has holes in its case and should be allowed to present prior bad act evidence to fill those holes. Again, the State is saying the quiet part aloud and requesting the Court permit admission of the allegations for exactly the reason they are prohibited in the first place. Like in *Tavares*, the State wants to admit evidence of prior bad acts so it can rely on those prior bad acts to secure a conviction improperly. The State should not be permitted to create unfair prejudice against the Defendant because the State has a "vacuum" in its case that can only be filled by admitting presumptively inadmissible evidence. The State is held to a high burden for a reason, and it is the State's duty to present evidence beyond a reasonable doubt to prove the case in front of the jury. If the State cannot find the proper amount of evidence to prove its case in chief, it has an ethical duty to make a determination whether or not to proceed with the case. It is not the job of the Court to give the State an unfair advantage to the demise of the rights of the Defendant, and the Court should deny the State's request as such.

DATED this 29th day of April, 2020.

Daniel Martinez Law, LLC

Daniel E. Martinez, Esq.
Nevada Bar No.: 12035

CERTIFICATE OF SERVICE

I, Daniel E. Martinez, Esq., Nye County Public Defender and counsel for the Defendant, Cole D. Engelson, do hereby certify that I have served the following:

Defendant's Opposition to Bad Act Evidence in
Case No. CR9226
State v. Cole D. Engelson

upon said Plaintiff by delivering a true and correct copy thereof on April 29, 2020, to the following:

NYE COUNTY DISTRICT ATTORNEY'S OFFICE

Daniel E. Martinez, Esq.

DANIEL MARTINEZ LAW

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

Case No. CR9226

Department 2

The undersigned affirms that this document does not contain the social security number of any person.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant. /

REPLY TO OPPOSITION TO BRIEF IN SUPPORT OF ADMITTING BAD ACT EVIDENCE

COMES NOW THE STATE OF NEVADA, by and through its attorney, CHRIS ARABIA, NYE COUNTY DISTRICT ATTORNEY, through Chief Deputy District Attorney Kirk D. Vitto, and submits this Reply to the Opposition filed by the defense as it pertains to the admission of "bad act" evidence at the trial currently set to commence in August. The State also requests a date certain in order to have witnesses present for this Court's consideration while deliberating whether and/or to what extent "bad act" evidence should be admitted as part of the State's case-in-chief.

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POINTS AND AUTHORITIES

In their opposition the defense says that the defendant "does not know what happened to the little girl the night she died because he was too intoxicated. He suspects she may have incurred the injuries by falling while he gave her a shower before bed." That is not what he told 3 or 4 Detectives and other persons. He was very clear that the child was fine before she went into the shower, she wasn't fine when she got out, and he admitted striking her on more than one occasion and in more than one manner. He had no difficulty speaking at length and in detail regarding what had occurred.

The defense also represents to this court that no previous incident was "documented". That is untrue. As can be gleaned from the prosecutions motion, there are medical records and eyewitnesses. The defense says, "The incidences alleged are not close in time to the death of Yessenia". The entire relationship between the defendant and Yessenia is only about ten months, beginning around September of 2016 when Yessenia's mother, Victoria, rekindled a relationship with the defendant, resulting in their moving in with one another in Pahrump on May 1, 2017 where Yessenia died on July 15, 2017. During that time frame the prosecution has made this Court aware of at least two, perhaps three, incidents involving injury to Yessenia involving the defendant. The defense says, "There is no routine documentation suggesting medical professionals or anyone else alleged child abuse when the children sought treatment for an injury." That's not correct as at least one medical professional made his opinion clear to Victoria, but importantly, it's not any kind of legal prerequisite to the admission of "bad acts" the prosecution seeks.

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THE BAD ACTS SHOULD BE ADMITTED PURSUANT TO NRS 48.045(2)

NRS 48.045(2) says that:

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

The evidence the State seeks to admit will militate contrary to any expression that what occurred was a "mistake" or an "accident", without saying that the evidence isn't also relevant regarding "opportunity", "intent", "preparation", "plan" and/or "knowledge".

The prosecution is going to submit "bad act" evidence to the court and argue that the evidence is admissible to negate a claim that what happened to Yessenia was a "mistake" or an "accident". After all, **IN HIS OPPOSITION** the defendant says that he "does not know what happened to the little girl the night she died because he was too intoxicated. He suspects she may have incurred the injuries by falling while he gave her a shower before bed." That being his defense, coupled with the damning admissions made in recorded interviews with law enforcement, make the value of the evidence clear regarding "opportunity", "intent", "preparation", "plan" and/or "knowledge", while also negating any impact that reading *Tavares v. State*, 117 Nev. 725 (2001) might otherwise have because the case against the defendant is far more than circumstantial evidence, and the proper limiting instructions will be given should this Court rule the evidence admissible. The evidence also implicates the "other purposes" from *Ledbetter v. State*, 122 Nev. 252 (2006) explaining why a person would perpetrate such a crime.

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The defendant's reliance on *United State's v. Harris*, 661 F.2d 138, 142 (1981) as the legal authority for "The admissibility of evidence of other crimes, wrongs, or acts to establish absence of mistake or accident is well established, particularly in child abuse cases", is a position the prosecution wholeheartedly encourages this Court to adopt.

In *Harris*, the defendant explained the fatal injury to his wife's son as "that his son had fallen from his crib. The baby was thereafter transferred to a Cheyenne hospital, where he died on February 23, 1980. At that time Harris changed his initial explanation of how his son was injured and told the attending doctors that he was carrying the baby on his shoulders in the living room of his home when he tripped over a telephone cord, causing both the baby and himself to fall to the floor." *Id.* 139, 140. The defense wants this Court to apply *Harris*? By all means let's apply *Harris*.

In our case, the defendant explained that the child was fine, she entered the shower healthy, uninjured, not bruised, and left the shower dead or dying. He described striking the child, kicking the child, throwing the child, and how he could tell that something was wrong with the back of her head. Yessenia's blood was found on a pillowcase and towel. Undeniably, the defendant claimed he had been drinking, and on one hand while claiming not to remember what happened, on the other hand he demonstrated a remarkable recall of specific detail regarding what happened, i.e., how the child was acting, something being wrong with the back of her head, her having one eye halfway open, the child was fine, then collapsed while drying her off, and the physical struggle he described between the two of them.

The autopsy report and medical opinions in *Harris* are similar to what the court will hear in the instant matter. In *Harris*, the defense objected to the admission of prior

injuries, "The district court overruled these objections, and instructed the jury that such evidence could only be considered in connection with the issue of intent, and 'in relation to the absence of mistake or accident.'" *Id.* 141.

The court in *Harris* said:

> At the outset we note that there is no challenge on appeal to the sufficiency of the evidence to support the jury's determination that Harris caused the death of his infant son on or about February 23, 1980, by beating him on the head and in the abdominal area with his fists. In this regard, the Government's evidence proved, prima facie, that T'Mel's fatal injuries were not sustained in any fall **[that will be the same with the instant matter]**, and also established, prima facie, that such injuries were the result of a beating **[that will be the same in the instant matter]**. T'Mel was admittedly in the sole care and custody of the defendant when he received the injuries which resulted in his death **[that is the same with the ijnstant matter]**, and it was Harris who brought T'Mel to the hospital **[the defendant was on scene when emergency medical responded]**. So, the evidence, viewed in a light most favorable to the Government, clearly permits the inference that Harris did, in fact, assault his child on or about February 22, 1980, despite his denial and the fact that no one actually saw him strike his child **[which will be the same with the instant matter, with the addition that the defendant admitted striking Yessenia]**. In like manner, we believe the evidence also permits the inference that it was the defendant who struck his child on the occasion of his other injuries, including the fracture of his left tibia on or about November 5, 1979.

Id.

The court in *Harris* found "the conflicting stories which the defendant gave the hospital authorities concerning the injuries sustained by the child on or about February 22, 1980, is arguably some evidence of a general consciousness of guilt." *Id.* 141, 142.

The court in *Harris* found the decision by the district court to admit the "bad acts" was not an abuse of discretion:

> The district court, after careful consideration, rejected this argument **[that the "bad acts" were 'highly prejudicial in nature, and of relatively little probative value']**, and upon review we find no abuse of discretion.

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> The evidence of these other injuries may well have been prejudicial in nature. A battered child is not a pretty picture. But in our view the evidence of other injuries was highly probative in nature. A district court has discretion to strike a balance between the probative value and the prejudicial nature of evidence, and we find no abuse of that discretion here.

Id. 142.

In *Harris*, the court quoted from *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), cert. denied, 415 U.S. 979, 94 S. Ct. 1566, 39 L. Ed. 2d 875 (1974), at 133 as follows:

> We think also that when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime. A child of the age of Paul and of the others about whom evidence was received is a helpless, defenseless unit of human life. Such a child is too young, if he survives, to relate the facts concerning the attempt on his life, and too young, if he does not survive, to have exerted enough resistance that the marks of his cause of death will survive him. Absent the fortuitous presence of an eyewitness, infanticide or child abuse by suffocation would largely go unpunished.

Citing *Bludsworth v. State*, 98 Nev. 289 (1982) as legal precedent for the position that "Under existing law, a single incident is not probative of absence of mistake or accident, it takes many purported accidents to reach that burden, and the State has not done so" is not a very well-reasoned interpretation of Bludsworth, giving the defense the benefit of the doubt. The fact pattern in *Bludsworth* is similar and helpful to the case before this Court. "At trial, the defense had claimed that [the stepfather] accidentally injured Eric [the two-year old stepson that died, murdered, as the result of head injury] by dropping him as Eric and he climbed the stairs in the family home. [On appeal] Appellants argue that all evidence presented at trial was consistent with the theory that Eric's

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injury was accidental." *Id.* 290. The appellate court disagreed. In the instant matter, although admittedly striking Yessenia, the defendant claims her death must have been accidental or did otherwise result from his voluntary intoxication which isn't a legal defense to the offense before this court.

Additionally, like in the instant matter, in *Bludsworth*, the defendant "was alone with [the victim] at the time of the fatal injury, and he admitted involvement in the purported accident", *id.* 290, 291, **which is exactly what happened in the instant matter**. In *Bludsworth*, "[d]uring the trial, considerable evidence was presented that Eric had sustained numerous bruises, including a bite mark on his scrotum, prior to the day of his fatal injury." *Id.* 291. In *Bludsworth*, the court determined that "the bite mark and other bruise evidence", "prior to the day of his fatal injury", was "independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidentally, injured on the day in question. Proof that a child has experienced injuries in many purported accidents is evidence that the most recent injury may not have resulted from yet another accident." *Id.* 291, 292.

The defendant also states that the prosecution has only referenced "a single accidental incident". That's not true. The State is alleging at least two, perhaps three, incidents in a relatively brief span of time.

After this Court hears the evidence, this court will then determine, in an exercise of sound and reasoned discretion, whether the evidence is relevant, clear and convincing, and whether there is a danger that the evidence, if admitted, is unfairly prejudicial, in that it substantially outweighs the prejudicial effect, and whether the

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concern could be completely alleviated with the necessary and proper limiting, jury instructions that jurors are presumed to follow.

The evidence sought to be admitted is not being presented to otherwise supplant or support a "week" case. It is the position of the prosecution that the evidence should absolutely be presented to this Court for the purpose of being admitted, and a ruling thereafter and thereupon being had.

Like the defendant, the prosecution urges this court to follow *Tavares* and *Harris*. If this Court determines that the evidence should be admitted, the court should also provide the necessary limiting instruction, and because the case against the defendant is not exclusively, or even predominantly circumstantial, the two problems with *Tavares* on appeal will have been averted.

DATED this 26 day of April 2020.

CHRIS ARABIA
NYE COUNTY DISTRICT ATTORNEY

By _____
KIRK D. VITTO
Chief Deputy District Attorney

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
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CERTIFICATE OF SERVICE

I, Kasondra Ward, Executive Legal Secretary, Office of the Nye County District Attorney, Post Office Box 39, Pahrump, Nevada 89041, do hereby certify that I have served the following:

REPLY TO OPPOSITION TO BRIEF
IN SUPPORT OF ADMITTING BAD ACT EVIDENCE in
5TH JDC Case No. CR8407
STATE v. ERNEST HARVEY GOODSON

upon said Defendant herein by personally delivering a true and correct copy thereof on 5/27/20 to the following:

Daniel Martinez
At The Nye County District Attorneys Office

Ronni Boskovich
At The Nye County District Attorneys Office

K Ward
Kasondra Ward

NYE COUNTY DISTRICT ATTORNEY
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No. CR-9226

Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE HONORABLE ROBERT W. LANE, DISTRICT JUDGE

-oOo-

THE STATE OF NEVADA, Plaintiff, vs. COLE DUANE ENGELSON, Defendant.	TRANSCRIPT OF PROCEEDINGS DEPOSITION OF CHRISTOPHER PULLEN MAY 21, 2020 10:05 A.M. PAHRUMP, NEVADA

APPEARANCES:

For the State: KIRK D. VITTO, ESQ.
CHIEF DEPUTY DISTRICT ATTORNEY
Nye County Courthouse
Pahrump, Nevada 89060

For the Defendant: DANIEL MARTINEZ, ESQ.
DEPUTY PUBLIC DEFENDER
3340 South Hwy. 160, Suite 202
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RONNI BOSKOVICH, ESQ.
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3190 South Highway 160, Ste. H
Pahrump, Nevada 89048

The Defendant: COLE DUANE ENGELSON

Reported by: CECILIA D. THOMAS, RPR, CCR No. 712

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PAHRUMP, NYE COUNTY, NEVADA, WEDNESDAY, MAY 21, 2020

10:05 A.M.

-oOo-

P R O C E E D I N G S

THE BAILIFF: All rise.

THE COURT: Thank you. Good morning. Please be seated.

MR. VITTO: Thank you, Your Honor. Good morning, Your Honor.

MS. BOSKOVICH: Good morning.

THE COURT: 9226, State versus Cole Engelson. Time and place set for a deposition.

Mr. Vitto, do you want to brief the record for us and get us started?

MR. VITTO: Your Honor, there's not much to brief. We are going to be calling Christopher Pullen to the stand today to give a pretrial deposition of what we anticipate his testimony to be at the upcoming trial in August. We're ready to go. Both sides are ready to go.

THE COURT: Very good. Where's Mr. Pullen at?

MR. VITTO: In custody. He's in custody.

THE COURT: Anything you want to say before

we call him in and get started?

MR. MARTINEZ: No, Your Honor. But I will probably have a little speech at the end when we're all done.

THE COURT: That'll be fine.

MR. MARTINEZ: Thanks, Judge.

THE COURT: You can get Christopher.

Christopher, before you sit down, will you raise your right hand and be sworn for us.

Whereupon,

CHRISTOPHER PULLEN,

having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Thank you. Have a seat, Christopher, and the attorneys are going to take turns asking you questions.

Mr. Vitto.

DIRECT EXAMINATION

BY MR. VITTO:

Q. Please state your name for the record, spelling your last name?

A. Christopher Pullen, P-u-l-l-e-n.

Q. Now, Mr. Pullen, obviously we're in

unchartered territory as a nation. A lot of people in the courtroom are wearing masks. I also know that it can be difficult for the court reporter to hear and be able to type everything down correctly. And so I'm just going to ask you -- and personally, I respect everybody's boundaries during this time; people do what they got to do to protect themselves, et cetera, et cetera -- if you feel safe, I would prefer, frankly, for the court reporter and all of us to be able to hear you better, that you not wear a mask. But if --

A. I'm okay.

Q. Okay, great. Thanks. Thank you, sir.

MR. VITTO: So may the record reflect that Mr. Pullen entered the courtroom and was seated wearing a mask. He doesn't have a problem testifying without it; he's taken it off. I think he needs to be administered an oath, and we can go forward.

THE COURT: He already was administered the oath.

MR. MARTINEZ: Judge, as a matter of record, can we have the oath administered to him while we're on the record here, Your Honor, and it's being transcribed.

THE COURT: Weren't we on the record when

she administered the oath?

THE BAILIFF: We were.

MR. MARTINEZ: Did I miss that? Sorry. I got sidetracked by the speech about masks.

THE COURT: I think you and Kirk were talking to each other at the time she administered the oath. You might not have caught it.

MR. MARTINEZ: Thanks, Judge.

Q. (By Mr. Vitto) Now, Mr. Pullen, obviously, you're dressed in prison garb. Where are you currently housed?

A. High Desert State Prison.

Q. Now, do you have access to drugs at the State Prison?

A. Sure.

Q. There are drugs in the prison?

A. Yes.

Q. Have you taken drugs recently?

A. No, sir.

Q. How long has it been since you used illegal drugs?

A. Seven months.

Q. So you feel clear-minded today?

A. Absolutely.

Q. Now, Mr. Pullen, you're a convicted felon?

A. Yes, sir.
Q. How many times in the last ten years?
A. Twice.
Q. And for what kind of offenses?
A. I have Possession of a Controlled Substance and I got Under the Influence of Controlled Substance.
Q. So two felony drug offenses?
A. I might have three; I'm not quite sure. It might be two or three.
Q. Two or three in the last ten years?
A. Yeah.
Q. And they're drug-related offenses?
A. Yeah.
Q. Now, do you know Cole Engelson?
A. I do.
Q. How do you know Cole Engelson?
A. I was in jail with him.
Q. And when did you first meet Cole Engelson?
A. 2017.
Q. And where were the two of you housed.
A. (Inaudible) -- I mean in Pahrump County Jail, A-Wing.
Q. And what is the A-Wing?
A. Special needs wing.
Q. And what does special needs mean?

A. For like if you're an ex-gang member or you're, you know, have a messed up case.

MR. MARTINEZ: Object at this point, Your Honor; foundation.

Q. (By Mr. Vitto) Foundation.

Do you know what the special needs wing means in the A-Wing at the Nye County Detention Center?

A. Do I know what it means?

Q. Yeah.

A. Yeah, protective custody.

Q. And who was in custody first, you or Mr. Engelson?

A. He was.

Q. So when you got there, he was already there?

A. Yeah.

Q. And did he choose, Mr. Engelson, did he choose to confide in you with regard to the basis for his incarceration?

A. Pretty much, yeah.

Q. All right. Do you see him in the courtroom today?

A. I do.

Q. Can you describe an article of clothing

he's wearing?

A. He's wearing striped, orange and white striped prison clothes.

MR. VITTO: Your Honor, may the record reflect that this witness has made an in-court identification of the defendant Cole Engelson?

THE COURT: Yes, it will.

Do you have any concern about the mask? I don't, but if you do for the record.

MR. VITTO: You know what, I think it probably appropriate, and thank you, Judge. Again, I'm going to respect people's boundaries, but I think that --

THE COURT: Well, I guess that was more an appropriate objection for the Defense than for you. But he identified Cole. If you guys have any concerns, "How do you know it's Cole who's wearing a mask?" we can address it.

MR. MARTINEZ: No concerns on that today, Judge.

MR. VITTO: We're stipulating to the identification?

MR. MARTINEZ: Sure.

Q. (By Mr. Vitto) All right. Now, Mr. Pullen, does the defendant look about the same

today as when you last saw him?

A. Yep.

Q. Did the defendant become aware of your criminal history?

A. I don't know if he was aware of it.

Q. Okay. Did you guys talk about your criminal past?

A. A couple of things, not nothing major. Just how many times I've been in prison.

Q. Okay. Was your criminal history perhaps a basis for his wanting to confide in you?

A. I guess.

MR. MARTINEZ: Objection, Your Honor, speculation.

Q. (By Mr. Vitto) Did he ever say anything like, "I think I can trust you because..."?

A. Yes.

Q. He did?

A. Because I've done time.

Q. Is that what he said to you?

A. Yes.

Q. Are you aware of his speaking to anyone else about the subject matter of his incarceration?

A. No.

Q. If he did, you're unaware of it?

A. Right.
Q. How many other people were in the A-Wing with you, if you recall?
A. Ten at the most.
Q. Okay. Now, I want to direct your attention to September 21st, 2017. Do you recall being interviewed by a detective with the Nye County Sheriff's Office?
A. I do.
Q. And how did that come about?
A. I asked to talk to him.
Q. And why were you incarcerated at that time?
A. For a probation violation.
Q. How long had you been --
A. A Drug Court violation.
Q. Okay. How long had you been incarcerated before speaking with the detective?
A. Thirty -- 30days, 31 days.
Q. So you hadn't had any drugs for at least that amount of time?
A. Yeah.
Q. So at the time you spoke with the detective, you were drug free and clear-minded?
A. Yep.
Q. Do you happen to have a recollection of the

last conversation between the defendant and yourself?

A. The last conversation?

Q. Yes.

A. Before I went to prison?

Q. Yes.

A. I asked him to call my wife for me and tell her I was going to prison.

Q. Okay. So the last time that the two of you spoke, the defendant was yet unaware that you had spoken to law enforcement?

A. Yeah.

Q. Have you ever heard from him in any way regarding what you have told law enforcement he told you?

A. No. But my wife did get a threatening phone call. I'm not quite sure if it was him or who.

MR. MARTINEZ: Objection; foundation, Your Honor.

MR. VITTO: I will ask some follow-up.

THE COURT: Thank you.

Q. (By Mr. Vitto) So your wife received a threatening phone call, but you have no idea who it came from?

A. Right.

Q. How long ago was that?

MR. MARTINEZ: And, Judge, I'm still objecting as to foundation and to hearsay as well. Mr. Pullen wasn't present for the phone call.

THE COURT: Mr. Vitto currently is establishing foundation. We're not in front of the jury. As it is currently, that statement has no evidentiary weight, but we'll see if it does or not.

MR. MARTINEZ: Understood, Your Honor. And I'm still going to be objecting for the record. I know that because this is a deposition, both sides are being given a long leash, and we're probably going to have to redact some of the transcript later on.

THE WITNESS: It was probably February or March of 2018.

Q. (By Mr. Vitto) Okay. Your wife still have that same phone number?

A. No. Like I said, I don't know if it was --

MR. MARTINEZ: Objection, Your Honor; there's no question.

THE COURT: Sustained.

Q. (By Mr. Vitto) Now, let's go back. We're going to kind of go back to your interview with the detective and the things that the defendant told you. Did he tell you what he did for a living?

A. Yes.

Q. And what was that?
A. He said he was a DJ, slash, bouncer at a strip club called Little Darlings.
Q. In Las Vegas?
A. In Las Vegas.
Q. And did he tell you where he lived in Pahrump?
A. He told me he lived on -- I believe he said Manse.
Q. All right.
A. He told me he lived over there by the bar that Motley Crue guy owns.
Q. Okay. He mentioned that?
A. Yeah.
Q. Now, how often would the two of you engage in conversation?
A. All the time.
Q. Every day?
A. Yeah.
Q. Would the two of you stick together?
A. Yeah. Play cards together, dominoes.
Q. Pass the time?
A. Yeah.
Q. All right. And you knew why he was in jail?

A. Yeah.

Q. Now, a part from anything that he said to you, did you know any details about what he had done?

A. No.

Q. So anything you knew about the case came directly from him?

A. Yes.

Q. Only from him?

A. Yep.

Q. What did he tell you regarding his being in jail for the homicide of a three-year-old baby girl?

A. What did he tell me?

Q. Yes.

A. He told me that he got drunk; he was drinking; and that he was trying to give the baby a bath, and that she was fussing over getting her hair washed. And he spanked her butt, and she fell and hit her head.

Q. All right. Now, did he -- you said that he said he spanked her butt. Specifically in relation to spanking her butt, did he give you any detail about injury?

A. He said that there -- that she had some type of -- she fell on a cup or something, and that there was welts on her -- she hit her head. That's

all I know.

Q. Now, did he say anything about injury to her buttocks?

A. He said that she had little -- like, three little welt marks from where he hit her. Like from his fingers or something on her butt.

Q. All right. And what happened after she fell and hit her head?

A. He pretty much just gave up on trying to have her do the bath, and he dried her off and put her to bed.

Q. All right. Now, did he say what happened after he put her to bed?

A. He said that he went back to drinking, and that he went and laid down because he had to work that night. And he caught her, like, fiddling around on some type of dresser or something, and she was messing around with some pills.

Q. Okay. And what happened after that?

A. That he spanked her butt again, and she hit her -- she fell forward and hit her chin, and then she fell back and hit her head.

Q. And did he say what happened after that?

A. He said he put her back in bed, and he went back to sleep.

Q. All right. So obviously, at least according to him and what he's described to you, the child wasn't dead or dying from the fall in the bath because she was later climbing around, and he had to hit her again; is that correct?

A. Right. That's what he said.

Q. All right. And you described that he told you that she fell and hit her chin, and then she fell backwards and hit her head again?

A. Yes.

Q. That's what he told you?

A. Yes.

Q. Now, do you recall his giving you any further detail about what she was climbing on or sitting on?

A. He said it was some type of -- I'm not quite -- he said it was some type of dresser, like a roll dresser or something like that.

Q. And at one point did he describe to you becoming alarmed at the child's condition in any way?

A. He said when he got back up, he looked down at her. Like her eye was still -- like one eye was open, like looking up at him.

Q. Did he notice she wasn't breathing?

A. I don't know. I know he said something

about he put her in cold water for some reason.

Q. Okay. So after he woke up and saw that she had one eye open and one eye closed, he put her in cold water?

A. Yeah.

Q. Did he seem -- was he describing to you that he didn't know what had happened?

A. Yeah. That's what he was saying, like he was acting like he didn't know what was going on because he was so drunk. Because he told me he drank like -- he did 30 shots of vodka.

Q. So he didn't know what happened after hitting the child at least twice, resulting in her hitting her head?

A. Yeah.

Q. Did he happen to say at any point during his hitting the child and the child falling and being bruised, hitting her head, his having to put her to bed, did he say anything about the baby crying or screaming after being injured by him?

A. No.

Q. Now, you mentioned previously that he said something about pills?

A. Yeah.

Q. What detail do you recall his telling you

about the baby getting into some pills?

A. He just said she was getting into pills. I don't know. He didn't give me no --

Q. No detail?

A. Yeah.

Q. Did it appear he was suggesting that the baby died from a drug overdose?

A. Yes.

Q. That's what he was suggesting?

MR. MARTINEZ: Objection, Your Honor; speculation.

THE COURT: Kirk, we kind of led into that, and I'm curious where that came from. Is there any foundation for that?

MR. VITTO: Well, the foundation is simply that the defendant told Mr. Pullen that the baby was on the dresser getting into some pills.

THE COURT: Right.

MR. VITTO: That's it.

THE COURT: And then he told him the baby was using drugs?

MR. VITTO: Just -- I'm saying an accidental overdose. The baby was getting into pills and accidentally overdosed.

THE COURT: So is that the story? The

defendant told you that the kid got into pills or something?

THE WITNESS: Yeah. She was messing around with some pills; that's all he said.

THE COURT: On the dresser?

THE WITNESS: On the dresser.

MR. VITTO: I can ask some follow-up that might help.

Q. (By Mr. Vitto) Did he say anything about whether he saw the baby ingest pills?

A. No.

Q. Just that the baby -- so she could have been playing with them on the top of the counter?

A. Right.

Q. He didn't say that he saw the baby eating pills?

A. No.

Q. Did he say what kind of pills?

A. No.

Q. Did he say anything about narcotics being in the house?

A. (The witness shook his head.)

MR. MARTINEZ: Your Honor, is that a "no"? He shook his head no; right?

THE WITNESS: No.

MR. MARTINEZ: Thank you.

Q. (By Mr. Vitto) Now, you've testified that the defendant told you he was trying to give the baby a shower or a bath and she fell and hit her head. And you testified that the defendant told you the baby was on the dresser, and he smacked her and she fell and hit her head. And I believe that you said that it was some point after that, that he then tried to -- I'm going to use a word here that you didn't use -- he tried to revive her with a cold bath. Is that basically a correct chronology?

A. Yes.

Q. Okay. And the cold water revival bath was after the baby had one eye open and one eye closed?

A. Yes.

Q. And that's after he woke up and found her that way?

A. Yeah. After the lady's son woke him up or something.

Q. Okay. And we'll get into that in a second.

Did he ever say anything to you along this chronology -- and the chronology that I'm referencing is the shower and hitting the head, the dresser, hitting the head, the one eye open, one eye closed, and the cold bath. That's my chronology. Okay.

Anywhere along that line, did the defendant say anything to you about seeking medical attention for the baby?

A. No.

Q. And this dresser or whatever it was, that was in his room?

A. Yes.

Q. Is that what he told you?

A. Yes.

Q. All right. And I think you mentioned earlier in regard to any detail about what he was drinking, he told you he had 30 shots of vodka?

A. Yes.

Q. Now, I want to take you back to his referencing the pills for a second. What was your reaction when he told you that the baby was playing with pills?

A. I just think that he was trying to use that as an excuse of what happened.

MR. MARTINEZ: Objection, Your Honor; speculation.

THE COURT: Overruled.

Q. (By Mr. Vitto) Go ahead. That he was what?

A. That he was just using that as an excuse

for what happened to the baby.

Q. Okay. So if I understand what you've told people about what the defendant told you, he was saying, "I don't know what happened. I don't know what happened," but he seemed to remember an awful lot; would that be a fair characterization?

A. Yeah.

Q. Now, you mentioned something about the girlfriend's son coming in, and we'll get to that in a second, but let me do this first. Do you know the name of the girlfriend?

A. Victoria.

Q. Okay. And he told you that?

A. Yeah.

Q. And Victoria was the mother of the little girl that he hit?

A. Yes.

Q. Do you know the name of the little girl?

A. No.

Q. Did he ever tell you the name of the little girl?

A. No.

Q. He never called her by name?

A. He just said that she was his favorite.

Q. She was his favorite, but he never

mentioned her by name?

A. Yep.

Q. So Victoria's son came in the room. Did he tell you what time Victoria's son came in the room?

A. I'm not quite sure, no.

Q. You don't remember today?

A. Yeah. I don't remember.

Q. You don't remember what he said?

A. Right.

Q. And from your interview with the detective from two-and-a-half years ago, it was clear that you had formed an opinion regarding when the baby died?

A. Right.

Q. What's your opinion?

A. My opinion is that she didn't make it out of the shower.

MR. MARTINEZ: I'm going to object at this point, Your Honor. Again, it's speculation.

MR. VITTO: Your Honor, his opinion is based on what the defendant told him, and I think it's --

THE COURT: Well, let's establish that.

What's that opinion based on?

THE WITNESS: Yes. Once she initially hit her head. I'm just saying what he told me.

THE COURT: Right.

THE WITNESS: That's my, in my opinion, she didn't make it out --

MR. MARTINEZ: And again, Your Honor, my objection is also based on the fact that, to my knowledge anyway, Mr. Pullen has no experience in any sort of crime scene or homicide investigations, nor any medical experience in determining the time of death.

THE COURT: Even so setting aside that argument, he has no basis for that speculation. It's just an opinion. So it's sustained.

MR. MARTINEZ: Thank you, Judge.

Q. (By Mr. Vitto) Now, in your interview, you mentioned the defendant seeming to be remorseful.

A. I believe he was more remorseful --

MR. MARTINEZ: I'm going to object, Your Honor. Is there a question posed?

Q. (By Mr. Vitto) Do you recall talking about that?

A. Do I recall talking that he was remorseful or not?

Q. Yes.

A. No. I don't recall talking about it. But it was just, once again, my opinion of how he was --

how he was saying it.

Q. And it seemed that he was sorry he was in trouble, not sorry for what he did?

A. Yes.

MR. MARTINEZ: I do need to object there, Your Honor. I don't think that was testified to.

THE COURT: Let me clarify a little bit.

You can't give your opinion on whether or not the child died in the shower or not, because you have no clue, and it's just an opinion.

THE WITNESS: Yes, sir.

THE COURT: But you can give your opinion on your talks with him whether you felt he was remorseful or not.

THE WITNESS: In my opinion, I feel that he was more remorseful that he got -- that the baby died and that he got caught for it.

THE COURT: And that he's in trouble?

THE WITNESS: He's in trouble.

THE COURT: Rather than the death of the child?

THE WITNESS: Yes.

Q. (By Mr. Vitto) And that's based on your conversation with him?

A. Yes.

Q. And seeing him every day --
A. Yes.
Q. -- all day? Now, did he tell you that he had a drinking problem?
A. He said, "Well, you know, I might have a -- I might think I have a drinking problem after this happened." He kind of chuckled like ha-ha.
Q. Okay. Did he tell you where Victoria was?
A. He said that her and I guess her older daughter had a nail appointment.
Q. All right. So during the time that these things were happening with the defendant and his favorite, the little girl, Victoria and Victoria's older daughter were at a nail appointment?
A. Yes.
Q. And was he angry about that?
A. He was angry -- he was angry -- he said he was mad because it was taking her so long. He said it was taking her like four hours just to get her nails done.
Q. Did he tell you that he had actually made that nail appointment for Victoria?
A. No. He didn't tell me that.
Q. Did he tell you anything about what he and Victoria would argue about?

A. You know, financial --

MR. MARTINEZ: Objection, Your Honor. There hasn't been any testimony about an argument.

THE COURT: Say it again?

MR. MARTINEZ: There hasn't been any testimony about any argument.

THE COURT: I agree.

Did he tell you that the two of them argued?

THE WITNESS: Yes.

Q. (By Mr. Vitto) Did he tell you what they were arguing about?

A. Yes.

Q. What were they arguing about?

A. Financial problems, and that there was some guy that was coming around, her ex-boss or somebody, that was treating her kids better than he was treating his kids.

Q. But that day, he was specifically upset that Victoria's nail appointment was taking as long as it was?

A. Yes.

Q. At any point did he open up and explain why he needed to talk to someone about this?

A. He said it was because it was building up

inside of him. The guilt was eating at him.

Q. All right. Do you recall specifically anything about a bruise in between her butt crack?

A. I vaguely remember. I'm not -- he said something about she fell on a cup.

Q. All right. Anything specifically about a bruise on the back of her leg?

A. Yeah. He said he pinched her. But at first he said he -- at first he said he was holding her down so he could wash her hair, and then that's how she got it. And I told him, "Come on, man, she's not going to get a bruise from you just holding her down." And he was like, then he told me he pinched her.

Q. So you kind of called him out on it?

A. Yeah.

Q. And what was his reaction to that?

A. He was just -- I mean, there was no reaction. I guess he was trying to figure out I called him out on it.

Q. And at one point did he describe any of the -- specifically describe any of the bruising to you?

A. Just the three-finger one. You know what I mean. And then like a half-moon indentation. I'm not

quite sure where that one was at, maybe on her back of her -- on her back or something.

Q. Okay. And that was in reference to the cup?

A. Yeah.

Q. Do you happen to remember at one point when he was telling you about what happened with the little girl, you were telling him, "Don't lie to me"?

A. Yeah.

Q. What was the context? What was the context of that? How did that come about?

A. About him holding her down and her getting a bruise.

Q. Okay. So what did you say to him?

A. I told him, "You don't have to lie to me. If you don't want to keep it real, then don't talk to me about it."

Q. All right. And how did he respond to that?

A. He didn't. I mean, he just -- like I said before, I think he just thought I was calling him out on it.

Q. So if I understand what he's told you in regard to the two incidents -- and I just want to make sure I have this straight in my mind -- the baby hit her head in the shower, and he put her to bed; is that

correct?

A. Yeah.

Q. And the baby hit her head after the dresser incident, and he put her back to bed; is that correct?

A. Yeah.

Q. And what time of day would this be; do you recall?

A. I think he said -- I think he said that it was like two o'clock or something.

Q. Okay. Now, at one point -- so at one point, you got out of jail; you got out of the Nye County Detention Center?

A. Yes.

Q. And I think you went from -- correct me if I'm wrong -- you went from the Nye County Detention Center to prison?

A. Yes.

Q. All right. And then you got out?

A. No, no. I went from Nye County back to the streets. And then I came back in, and then I went to prison.

Q. I got you. Okay. Yes, thank you. That's exactly correct. But at one point you found yourself -- and I'm just going to direct yourself, or direct you to December 18th, 2019, some five or six

months ago, were you at -- is it the Clark County Detention Center?

A. No. I was at Stewart and Mojave City Jail.

Q. I got you. And that's when a prosecutor from Nye County and Investigator Todd Arms came to see you; is that correct?

A. Yes.

Q. And at the time that you spoke with the prosecutor and the investigator in the Las Vegas City Jail, were you drug free and clear-minded?

A. Yes.

Q. And just in a nutshell, did you tell that prosecutor and that investigator pretty much the same thing you told the detective previously?

A. Yes.

Q. Roughly the same thing you're telling us today?

A. Yes.

Q. Did the defendant, did he ever tell you that he felt guilty?

A. He said he --

MR. MARTINEZ: Objection, Your Honor; that's a leading question.

THE COURT: Say it again?

MR. MARTINEZ: That's a leading question,

Your Honor.

THE COURT: Overruled. It's kind of been asked and answered about the remorseful part, but you can go ahead and ask him.

Q. (By Mr. Vitto) Did he tell you how he felt about what he had done?

A. I think he -- yeah, he told --

Q. Did he tell you? Did he tell you how he felt about what he had done?

A. No.

Q. Do you recall whether he told you he dressed the baby before putting her to bed?

A. I believe he said he dressed her. I'm not quite sure, though.

Q. All right.

A. I know for sure he said he dried her off.

MR. MARTINEZ: Objection, Your Honor. There's no question asked.

THE COURT: Overruled.

Q. (By Mr. Vitto) What do you know for sure that he told you?

A. That he -- that he dried her off and put her to bed.

Q. Okay. Do you have children?

A. Yes, sir, I do.

Q. Do you have daughters?
A. Yes.
Q. How many?
A. I have two daughters.
Q. The prosecution gave you a benefit for interviewing with the detective and agreeing to testify; is that correct?
A. Yes.
Q. And what was the benefit that you received?
A. That I would get out on the streets.
Q. And that was back in -- when?
A. 2017.
Q. So in 2017, you were -- you spoke with the detective from the Nye County Sheriff's Office while in custody?
A. Yes.
Q. And after that, you received -- what happened after that as far as your case is concerned?
A. I went back to, obviously, the streets. And then I got violated on probation, and I went to prison.
Q. Fine. So how did you get to the streets, initially?
A. By talking to the detective.
Q. All right. So -- and I'm just going to

help you out here, and you let me know if I'm wrong -- the prosecution agreed not to oppose your own recognizance release?

A. Yes.

Q. And so you were released?

A. Yes.

Q. But what happened after that?

A. I went out and started using drugs again.

Q. Okay. And what happened after that?

A. Then I came back to jail and went to prison.

Q. All right. Is testifying today, was that a big decision to make?

A. Yes, it was.

Q. Did you talk to your wife about it?

A. I did.

Q. What did she say?

A. She said that if it would have happened to your daughter, wouldn't you want somebody to speak up for her?

MR. MARTINEZ: Objection; hearsay, Your Honor.

MR. VITTO: Not using it for the truth of the matter asserted, Your Honor.

THE COURT: Overruled.

MR. VITTO: Thank you, Your Honor.

Q. (By Mr. Vitto) So why are you speaking today?

A. Because I'm speaking for the little girl that can't speak for herself.

MR. VITTO: I have no more questions of this witness at this time.

THE COURT: This is the first time you've testified under oath in this matter?

THE WITNESS: Yes.

THE COURT: Are there any promises from the State for you today?

THE WITNESS: Nope.

THE COURT: Mr. Martinez.

MR. MARTINEZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MARTINEZ:

Q. I'm going to jump around a little bit.

First, Mr. Pullen, you said that Cole told you the little girl fell on a cup; right?

A. Yeah, in the shower.

Q. Did he describe what the cup looked like at all?

A. No. He just said it was a cup that he was using.

Q. Did he tell that it was glass? Did he tell you that it was plastic?
A. No.
Q. He told you that after she got out of the shower, he dried her off; right?
A. Yes.
Q. Did he explain how he dried her off?
A. Did he explain how he dried her off?
Q. That's the question, yes.
A. No.
Q. Did he go through a typical routine of drying her off?
A. No.
Q. He told you she was climbing on a dresser?
A. Yeah.
Q. Did he describe how tall the dresser was?
A. No.
Q. Did he describe what else was on the dresser?
A. No.
Q. Did he describe the exact location of the dresser?
A. No.
Q. He never said that the child was crying or screaming; right?

A. No.
Q. He never said that she lost consciousness; right?
A. No.
Q. Did Cole ever tell you if he was taking any medication?
A. No.
Q. For specifically for alcoholism?
A. Nope.
Q. Did he tell you what time the nail appointment was?
A. Nope. Wait, I think he did. I think he told me at ten o'clock?
Q. 10:00 a.m.?
A. Yes.
Q. Okay. Now, you met Cole in the Nye County Detention Center; right?
A. Yes.
Q. And that was in the A-Wing?
A. Yes.
Q. And that was the day that you were booked into custody?
A. Yes.
Q. Cole was moved to the A-Wing on the same day?

A. No.
Q. No. Cole was already in the A-Wing when you got there?
A. Yes.
Q. Now, you said the A-Wing is for protective custody; right?
A. Yes.
Q. Why did you need protective custody?
A. Because I'm an ex-gang member.
Q. What gang?
A. Is that relevant?
Q. What gang?
A. Skinhead.
Q. You never met Cole out of custody; right?
A. Never.
Q. You were booked into custody on August 15th, 2017?
A. (The witness nods.)
Q. Does that sound correct?
A. Sounds correct.
Q. And that was on a probation violation; right?
A. That was for a Drug Court violation, yes.
Q. So a probation violation; right?
A. No. It was a Drug Court violation. I

didn't get violated for that one. I was already -- I got -- I came back.

Q. Okay. I understand.

(Counsel confer.)

Q. (By Mr. Martinez) As part of Drug Court, you were ordered to do inpatient treatment; right?

A. Yes.

Q. You did not complete that; right?

A. No, sir.

Q. And that was the violation?

A. Yes.

Q. Prior to being remanded into custody, when was the last time that you used any drugs?

A. In 2017?

Q. Yes.

A. Ah --

Q. Did you use the day before you were remanded into custody?

A. No.

Q. Did you use the day you were remanded into custody?

A. No.

Q. Did you use within the week you were remanded into custody?

A. No.

Q. How long was it prior to that?
A. A couple of months.
Q. What about your prescriptions?
A. My prescriptions for Xanax, yeah.
Q. Did --
A. Yes.
Q. Were you taking them daily?
A. Yeah.
Q. Were you still taking them while you were in custody?
A. Nope.
Q. No. They didn't give you prescriptions while you were in custody?
A. They gave me Gabapentin for my seizures, and that's it.
Q. Okay. Did you and Cole begin talking the first day you were there?
A. No.
Q. How long did it take for you two to start talking?
A. About two or three days.
Q. You said there's about ten people at most in A-Wing?
A. Yeah.
Q. Was it at capacity when you were there?

A. No.
Q. So how many people were in the A-Wing while you were there?
A. Ten. There's two, four, six, eight -- 16 beds there. There was ten people there.
Q. All right. In the A-Wing, are you confined to a cell 24 hours a day?
A. No.
Q. You're able to walk around the wing? There's some tables?
A. Yep.
Q. There's some chairs?
A. Yep.
Q. Did you talk to people other than Cole?
A. Yeah, yeah.
Q. Did you see Cole talk to people other than you?
A. Yeah.
Q. Did you play cards with other people?
A. Yeah. Pretty much me and Cole played cards.
Q. Okay. What about dominoes?
A. Dominoes, we played dominoes all the time.
Q. Just the two of you?
A. No. There was more -- there was sometimes

more people. When we played dominoes though, it was mostly just me and him.

Q. Do you agree that you and Cole became pretty close?

A. Yeah.

Q. Cole let you use his ID to make phone calls?

A. Yep.

Q. To your family?

A. Yep.

Q. To your wife?

A. Yep.

Q. To your daughters?

A. Yes.

Q. Are they really your daughters?

A. They're my stepdaughters, but their my daughters.

Q. Stepdaughters; all right. Now, how long were you in custody for before Cole confided in you about this?

A. Probably a week.

Q. A week. So it took him two to three days to start talking to you; right?

A. Yeah. Well, the first day I slept so.

Q. Well, that's what you just testified to was

that it took you two to three days before Cole started talking to you; right?

A. Yeah, it took two or three days.

Q. Okay. And about a weekend is when he confided in you about all of this; right?

A. Well, not all of it at one time, but over time, yeah.

Q. So this is over time?

A. Yeah, absolutely.

Q. So it wasn't just one conversation that you had?

A. No. We had many a conversations.

Q. About this case?

A. Yeah.

Q. Were they daily conversations?

A. No.

Q. Were they weekly conversations?

A. They were once every other day or so.

Q. Every other --

A. To be honest, I don't know. I didn't keep track of every day what we talked about. I know for a fact what he told me. That's all I know.

Q. So they're about every other day now?

A. Yeah.

Q. How long did it take you to reach out to

Detective Cox?

A. Thirty-two days -- 31 days.

Q. From the day that you were booked?

A. Yep.

Q. How long did it take you from the time you started having the conversations with Cole when he started confiding in you to reach out to Detective Cox?

A. Three-and-a-half weeks, three weeks.

Q. And now, throughout all of these conversations that he was having with you, was there ever anyone else around?

A. Nope.

Q. Did you guys whisper these conversations to each other?

A. No. We didn't whisper them. Just nobody was there.

Q. Nobody was in the A-Wing with you at all?

A. People were on the wing. It wasn't like we were shouting at the top of our lungs.

Q. Were there other people walking around while you were having the conversations?

A. Sure. I'm sure there was.

Q. And now, you reached out to Detective Cox yourself; right?

A. Yep.
Q. Directly to him?
A. Nope.
Q. How did you reach out to him?
A. I asked a deputy to contact somebody. No. Actually, it was a narcotics, because I didn't know who to talk to. And then he reached out -- I talked to a narcotic agent, and then he talked to -- he got the cops to come see me.
Q. So you reached out to a deputy in the jail?
A. Yeah.
Q. Do you remember which deputy that was?
A. No. I don't remember.
Q. Did you tell him that you -- did you tell him specifically you had information about Cole?
A. Nope. I just told him I wanted to talk to an officer -- a detective, actually. That's what I told him, I wanted to talk to a detective.
Q. How long did it take for Detective Cox to get in touch with you?
A. Maybe a day, day-and-a-half, two days.
Q. Did you talk to your attorney first?
A. No.
Q. How did Detective Cox get ahold of you?
A. He came and got me out of jail.

Q. He took you over to the District Attorney's Office?
A. Yep.
Q. Did you guys sit in a little meeting room together?
A. Yep.
Q. Who else was in the room with you?
A. Just me and him.
Q. Do you know if that was recorded?
A. I believe it was recorded, yes.
Q. You've listened to that recording since then; right?
A. Yes.
Q. You listened to that recording yesterday; right?
A. Yes.
Q. When you sat down and you met with Mr. Vitto?
A. Yes.
Q. To help refresh your recollection for today's date?
A. Yes.
Q. All right. That meeting with Detective Cox, that happened on September 21st of 2017?

A. Yeah.
Q. In the afternoon?
A. Yep.
Q. Is that the first time you have ever done something like that?
A. Yep.
Q. Never reached out to detectives before?
A. Nope.
Q. But you know there's value in doing it; right?
A. Sure.
Q. You know that you can get something out of it?
A. Yeah.
Q. That you can get released?
A. (The witness nods.)
Q. Sometimes charges can get dropped?
A. Yep.
Q. Right. As Mr. Vitto asked, you were released on an OR; right?
A. Yep.
Q. Specifically, a house arrest?
A. Yep.
Q. Now, you believed there was supposed to be more than just an OR release; right?

A. Do I believe there was supposed to be more?
Q. Yes.
A. No.
Q. You never told anyone that you believed the case was supposed to be dropped completely?
A. No. Matter of fact, I told Detective Cox I know I'm going to prison, but I want to get out to be around with my kids before I go.
Q. Now, the first year -- the first violation hearing in front of Judge Wanker, that was on September 22, 2017; right?
A. Yep.
Q. That's when she ordered you released on house arrest?
A. Yes.
Q. That involves an ankle bracelet; right?
A. Yep.
Q. You tampered with that ankle bracelet; right?
A. No. They say I did, but no.
Q. You tested positive with the Drug Court while you were out there in that time too; right?
A. No. I tested -- I came back negative.
Q. You were remanded back into custody on October 2nd, 2017; right?

A. Yep.
Q. Same A-Wing as before?
A. Yeah.
Q. With Cole?
A. Yeah.
Q. Did you talk with him when he went back into custody?
A. Yep.
Q. Did you tell him you spoke to Detective Cox?
A. Nope.
Q. Did you use his ID to make any phone calls?
A. Sure.
Q. You got released again though; right?
A. No.
Q. Told to report directly to Drug Court?
A. That was then. When I got out on house arrest on an ankle monitor, I was told to go directly to Drug Court.
Q. And you said the last conversation you had with Cole, you asked him to call your wife; right?
A. Yep.
Q. Did you tell him that you had talked to Detective Cox at that point?
A. Nope.

Q. Your probation was revoked; right?
A. Yep.
Q. And you were sentenced to prison?
A. Yep.
Q. Here in Nevada?
A. Yep.
Q. That case was run consecutively with a case out of White Pine County; right?
A. Yep.
Q. Both of those were drug offenses?
A. Yeah.
Q. You finished your sentence from Nye County; right?
A. Yep.
Q. Started on your sentence on the case from White Pine County; right?
A. Yep.
Q. Paroled on that case?
A. Yep.
Q. And you spoke a little bit about a conversation you had at the Las Vegas Detention Center; right, not the Clark County Detention Center?
A. No. It was the Stewart/Mojave City Jail.
Q. Okay. You were in that jail because you got arrested in North Las Vegas; right?

A. Sure.
Q. That was for another drug offense; right?
A. That I got arrested?
Q. Yes.
A. No. I got arrested for a parole violation.
Q. So you didn't get arrested for a drug offense in North Las Vegas?
A. Well, I -- well, yeah, yeah.
Q. That violated your parole and got you back in prison?
A. Yes.
Q. And that's where you are today; right?
A. Yeah. Well, can I say something?
Q. No. How long were you in the Las Vegas Detention Center before the District Attorney came to see you?
A. The District Attorney come to see me?
Q. Yes.
A. A day.
Q. Do you remember who it was?
A. I don't remember his name.
Q. Was he by himself?
A. No. He brought a -- he brought somebody with him.
Q. You asked them what you were going to get

out of it; right?

A. Did I ask them what I was going to get out of it?

Q. Yes.

A. No. I already got what I got was out of it.

Q. You told them you had trouble remembering everything?

A. Yeah.

Q. Because of all the drugs you've done in your life?

A. Sure.

Q. Told them you were living at Catholic Charities?

A. Yep.

Q. In Las Vegas; right?

A. Yep.

Q. But you haven't been out of custody since then?

A. No.

Q. So obviously, you haven't got back to Catholic Charities?

A. No.

Q. Is that your plan when you are released?

A. No.

Q. What's your plan?
A. I'm going to go be with my wife and kids.
Q. Where are your wife and kids?
A. I'm not going to say that in front of him and whoever is here with his people.
Q. We'll address that more a little bit later on. And you said you're at High Desert; right?
A. Yeah.
Q. And this is not the first time that you've been to Nevada Department of Corrections?
A. No.
Q. You're a multiple-time convicted felon; correct?
A. Yes.
Q. Eight times sound correct?
MR. VITTO: Your Honor, I'm going to object at this point. I've given Counsel a lot of leeway. I want him to have a full and fair opportunity to cross-examine this witness in regards to benefits provided, any potential bias, checking his memory. Fine with everything.
But my specific questions were how many convictions in the last ten years. The defendant has stated two or three. And pursuant to statute, anything outside of ten years is not something that

can be used for the purposes of impeachment, and I think Counsel would be going beyond ten years.

MR. MARTINEZ: I will be going beyond ten years, Your Honor. I have a couple of more questions that I want to ask Mr. Pullen, specifically one offense that did occur sometime ago. It is not a drop-dead date at ten years. The Court does have discretion to allow prior convictions in, even if they are outside of the ten years. And there's an analysis that needs to be done to determine whether or not it's proper to allow those in.

We're here for a deposition today, Your Honor. So again, I know the Court has given both sides long leeway here, and we can address it later on at the time of trial, if need be, and redact the transcript.

MR. VITTO: And that's fine if it's just a couple of questions. I know what it is that Counsel is going to go into, and I'm very satisfied with the explanation that he's going to get. But just for the Court's edification, and I think Counsel would agree with me, because we're both going to be -- if we find ourselves in that position at trial, there are things that we are going to ask to be redacted. And this could potentially be one of those things.

MR. MARTINEZ: Sure.

THE COURT: I understand. You can go ahead.

MR. MARTINEZ: Thank you, Judge.

Q. (By Mr. Martinez) Christopher, do you like being incarcerated?

A. No.

Q. You like being on the streets; right?

A. Sure.

Q. So much so that you escaped at one point in the past; right?

A. I didn't escape.

Q. Pled guilty to Escape; right?

A. Yeah.

Q. You met with Mr. Vitto yesterday; right?

A. Yep.

Q. To review what you would testify about today?

A. Yep.

Q. What did you go over? Well, let me -- I'm sorry, let me rephrase that question. Were the recordings from your prior interviews played for you?

A. Yes.

Q. Which ones?

A. Just the initial one with Mr. Cox,

Detective Cox.

Q. So your interview from when you were at the Las Vegas Detention Center, that was not played for you?

A. No.

Q. Did you go over any transcripts?

A. I don't believe so.

Q. Was there any new material provided to you?

A. No.

Q. You said Mr. Vitto didn't make any promises to you?

A. Nope.

Q. Mr. Pullen, do you know specifically why we're here today?

A. Do I know why we're here?

Q. Yes.

A. Yeah, to find out what I know.

Q. Do you know why we're taking your deposition?

A. No.

Q. You don't see a jury; right?

A. No.

Q. So you know this isn't a time for trial?

A. Yep.

Q. When does your sentence expire in NDOC?

A. August.
Q. Do you know that we're here today because no one believes you're going to appear for the trial?
A. That's fine.
Q. Do you know when the trial dates are?
A. No.
Q. Have you asked Mr. Vitto when the trial dates are?
A. I'm sure he's going to subpoena me.
Q. I hope he does.
A. I hope he does too.
Q. Can we have your promise that you will appear at the trial today?
A. Absolutely.
Q. Under oath?
A. Absolutely.
Q. Let's talk about that oath. You took an oath when you sat down; right?
A. Yep.
Q. Even though I missed it -- that's fine. That oath is to tell the truth; right?
A. Right.
Q. Under the penalty of perjury?
A. Right.
Q. Do you know what perjury is?

A. Sure.
Q. What is it?
A. That I would get up here and lie.
Q. Well, you know it's a crime?
A. Yes.
Q. You know it's a felony?
A. Yes.
Q. You know you're eligible for Habitual Criminal treatment?
A. I do.
Q. So if you lie on the stand, Mr. Vitto can file a Criminal -- a felony Complaint against you --
A. Sure.
Q. -- and he can seek to have you sentenced --
A. Yep.
Q. -- as an Habitual Criminal. Do you know what the penalties for Habitual Criminal are?
A. Life sentence.
Q. Without the possibility of parole? You've given us your promise today that you will appear and testify at the trial?
A. Absolutely.
Q. If you do not appear, do you know what that means?
A. That I lied on the stand and that I can be

given a life sentence in prison.

Q. Absolutely.

MR. MARTINEZ: Pass the witness, Your Honor.

THE COURT: Mr. Vitto?

MR. VITTO: Just a couple of questions, Judge.

REDIRECT EXAMINATION

BY MR. VITTO:

Q. Mr. Pullen, Counsel mentioned an Escape?

A. Yes.

Q. How long ago was that?

A. 1992, I believe.

Q. Okay.

A. '93, '92.

Q. So maybe 30 years ago?

A. Maybe, almost 30 years ago.

Q. How old were you?

A. Eighteen, 19.

Q. And what were the circumstances of that?

A. It was from a -- they are saying it was from a Fire Camp.

Q. And what happened; you walked away?

A. Yeah. I walked away.

Q. You didn't have to tunnel?

A. No. I didn't do none of that.
Q. You didn't have to cut through a barbed wire fence?
A. No.
Q. Fight off guards?
A. No.
Q. No explosives?
A. No.
Q. You just walked off?
A. Just walked away.
Q. And why?
A. Because my mother was passing away.
Q. And Counsel asked you about being shown anything new, and I think we went over a couple of these yesterday. Let me show them to you and see what you recall.
(Mr. Vitto shows the exhibits to Defense counsel.)
MR. VITTO: I would like to get these preliminarily marked?
(State's Proposed Exhibits 1, 2, and 3 are marked for identification.)
Q. (By Mr. Vitto) Now, Mr. Pullen, Counsel asked you -- he was asking you which recordings we let you listen to, and you mentioned the one with

Alex Cox; if there were any transcripts that we showed you, and you said no; if there was anything new or new information or anything like that?

Let me show you State's Proposed Exhibits, for the purposes of this deposition, 1, 2, and 3.

(State shows exhibits to Defense counsel).

Q. (By Mr. Vitto) Go ahead and look at these. Tell me when you've had an opportunity to see those, and I will ask you a couple of questions.

A. All right.

Q. Do you recognize those?

A. I recognize this one.

Q. Okay. And you saw that one yesterday?

A. Yes.

Q. And the reason it stuck out in my mind is --

A. I forgot about it.

Q. -- is we were asking about whether it was a tub or a shower, because in the -- when you were talking to Detective Cox, it was unclear to me whether the defendant was telling you about a tub or a shower.

A. Right.

Q. And as I recall, when you saw the shower, you kind of shuttered?

A. Yeah.

Q. Was there a reason for that?

A. Just because, you know, I mean I still believe today, in my opinion, that that's where she passed away.

MR. MARTINEZ: Objection, Your Honor. Same objection as before; it's speculation.

THE COURT: And we'll redact it. And we don't know where he's going and what he's basing it on. Let me hear the whole story.

MR. VITTO: I only have one more thing that I'm asking the Court to do.

Q. (By Mr. Vitto) And, Mr. Pullen, you told me the same thing. You told me that you get out sometime this summer; right?

A. Yes.

Q. And that you 100 percent anticipate cooperating and being at the trial to testify in August?

A. Yes.

MR. VITTO: Your Honor, does your clerk have those exact dates. I'm going to ask Your Honor to order Mr. Pullen to appear for those dates, because I'm not exactly sure how all the paperwork is going to work with his current situation, and I would like him to be aware of those dates when he's released.

THE COURT: All right. We'll ask Louise to bring in the calendar, unless you have them.

THE CLERK: I show, I believe the jury trial is August 11th at 9:00.

MR. VITTO: We begin August 11th.

MR. MARTINEZ: August 11th through the 28th.

MR. VITTO: Is there a break -- but it's --

MR. MARTINEZ: There's a few days in there.

Q. (By Mr. Vitto) August 11th through the 28th, do you agree to be here at the Fifth Judicial District Court to testify August 11th through the 28th?

A. Yeah. I will be in prison on the 11th, but I get out soon after the 11th.

MR. VITTO: Perfect. I have no more questions of this witness at this time, Your Honor.

THE COURT: Mr. Martinez, Ms. Boskovich, anything?

MR. MARTINEZ: I just have one more question. I know this is outside the scope of the other redirect; so if Mr. Vitto wants to object, I certainly understand.

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RECROSS-EXAMINATION

BY MR. MARTINEZ:

Q. When you went to speak to Detective Cox, did you tell him if you had information on anybody else?

A. I'm not quite -- I don't remember.

MR. MARTINEZ: All right. That's it, Your Honor.

THE WITNESS: I don't remember, to be honest.

THE COURT: Anything else for the witness?

MR. VITTO: No, Your Honor.

THE COURT: All right. Thank you, sir. You can step down.

MR. VITTO: I have nothing -- I have nothing further, Your Honor.

THE COURT: Anything? Give it some thought to decide what your motions are. We'll take care of it in the future.

MR. MARTINEZ: Of course, Judge. I just have a little monologue I guess that really I'm not asking for a ruling on. As I said, as I asked Mr. Pullen, we're here today because nobody believes he's going to show up for the trial. And when he doesn't show up for the trial, I know the State is

going to make a motion to bring all of this -- bring the transcript, bring the video of his testimony in today. I'm going to be objecting to that, because I don't think there's legal grounds for it. That's not the purpose for an unavailable witness.

THE COURT: He will have to meet all of those hurdles that they've tried to get him and so forth.

MR. MARTINEZ: Exactly, Judge. And other than that, I request a copy of the transcript from your court reporter for today's deposition.

THE COURT: Yes, sir. We'll provide that to you both.

MR. VITTO: And to be safe, Judge, both sides should probably have a video as well, if that's available.

THE COURT: Yeah. No problem.

MR. MARTINEZ: Thank you, Judge.

THE COURT: Anything else?

All right. We're adjourned.

THE BAILIFF: All rise.

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ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS.

Cecilia D. Thomas

Cecilia D. Thomas
RPR, CCR No. 712

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Case No.: CR9226

Dept. No.: 2

Sarah Westfall

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

vs.

COLE D. ENGELSON,

Defendant.

MOTION TO SUPPRESS DEFENDANT'S STATEMENTS

COMES NOW, the Defendant, Cole D. Engelson, by and through his Public Defenders, Daniel E. Martinez, Esq. and Ronni N. Boskovich, Esq., and hereby moves the Court for an Order suppressing his statements made to law enforcement.

This motion is made and based on all the papers and pleadings on file herein, the Points and Authorities submitted herewith, the exhibits attached hereto, and any further evidence and argument as may be adduced at the hearing of this matter.

DATED this 4th day of June, 2020.

Daniel Martinez Law, LLC

Daniel E. Martinez, Esq.
Nevada Bar No.: 12035

NOTICE OF MOTION

TO: Nye County, Plaintiff; and

TO: District Attorney, its Attorneys;

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Suppress Defendant's Statements on Calendar for hearing in Department 2 of the above-entitled Court on the 22 day of June, 2020, at 9:00 a.m. or as soon thereafter as counsel may be heard.

DATED this 4th day of June, 2020.

Daniel Martinez Law, LLC

Daniel E. Martinez, Esq.
Nevada Bar No.: 12035

DANIEL MARTINEZ LAW

POINTS AND AUTHORITIES
FACTUAL BASKGROUND

On July 15, 2017, just after 7:00pm, the Nye County Sheriff's Office and Pahrump Valley Fire and Rescue were dispatched to 5320 E. Manse Road in Pahrump, Nevada, for a three-year-old female that was not breathing. The child, Yessenia Camp, was later pronounced deceased at Desert View Hospital. While in route to the address, Sergeant Corey Fowles requested the assistance of a detective, and Detective Alexandra Fernandes was dispatched to the scene. Sergeant Fowles first spoke with Fire Chief Scott Lewis, who believed the cause of death was a domestic incident because the child was covered in bruises and her mother stated that the male who lived at residence killed the three-year-old.

Deputy James Burke was the first officer to speak with the male suspect, Cole Engelson. After a few questions, Detective Fernandes joined in the interview. Engelson admitted to having at least two drinks that were half water and half vodka. Both Deputy Burke and Detective Fernandes recognized through their training and experience that Engelson was intoxicated. He had an unknown odor of an alcoholic beverage emitting from his person when spoke; his eyes were glossy; and when he walked, he walked unsteadily. Deputy Burke had to assist Engelson several times to keep him from falling down.

At this time, no one read the *Miranda* warnings to Engelson. Instead, they proceeded directly to questioning, asking Engelson what happened. They also asked Engelson for permission to enter the house and take pictures. Engelson consented and answered Detective Fernandes' questions to best of his ability, as he did not remember much due to his intoxication. He also showed her around the house while they spoke. Engelson also went through his cell phone with Detective Fernandes, to try and recall a timeline of when things happened.

Eventually, Engelson was placed in handcuffs, and read his *Miranda* rights. He waived his rights, and upon learning that Yessenia had been pronounced deceased, started to cry, and continued speaking with Detective Fernandes. Engelson told her that he had worked the night before, came home and took the family to breakfast, sleeping very little, if at all, up to the point of the interview. He reiterated tha

he did not know what happened, but that he takes responsibility because he was the only one home with the child. Engelson was placed under arrest, transported to the Nye County Detention Center, and booked into custody just after 9:00pm. Later, at about 12:15am on July 16, 2017, a blood sample was drawn from Engelson.

Later that morning, at approximately 5:36am, Engelson was again interviewed by law enforcement, this time by Detectives Alex Cox, Wes Fancher, and Logan Gibbs. Engelson was wearing a green suicide smock and brought out of the jail and into the Sheriff's Office for the interview. Inmates are put in those smocks, and housed alone, when the detention center is concerned that the inmate may try to harm him or herself. Detective Cox begins the interview by reading Engelson his *Miranda* rights, which Engelson waived. The interview last about four hours, with each detective taking turns questioning Engelson and attempting to induce a confession from him. Engelson maintains that he blacked out from intoxication, so he does not remember how Yessenia died. He could only speculate as to what happened, but he did take responsibility because he was the only one home with her. The Detectives did not believe him, and continued their barrage of questioning in the hopes of getting clear answers.

That evening, just after 7:00pm, now Captain David Boruchowitz pulled Engelson out of his cell for yet another interview. Engelson was still wearing a green suicide smock. Captain Boruchowitz did not read Engelson his *Miranda* rights, but instead just asked if they had been read to him earlier, and if he still understood them. Captain Boruchowitz accuses Engelson of minimizing what happened and tells him that things will be better for him if he just confesses. Engelson maintained that he does not recall what happened due to his intoxication. After about an hour, the interview was concluded.

CONTROLLING LAW

I. *Miranda* Warnings Are Required

Miranda warnings are "required when a suspect is subjected to a custodial interrogation." *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1021 (2006). A defendant's statements mad

during a custodial interrogation may be admitted at trial only if *Miranda* rights were administered and validly waived. *Koger v. State*, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). A defendant is "in custody" under *Miranda* if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest so that a reasonable person would not feel free to leave." *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). Custody is determined by the totality of the circumstances, "including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning." *Id.* at 1081-82, 968 P.2d at 323. An individual is not in custody for *Miranda* purposes if the police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation. *Id.* at 1082, 968 P.2d at 323 (internal citations omitted).

Objective indicia of arrest comprise the following:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323.

Where the defendant is in fact a suspect, questioning which is reasonably likely to elicit incriminating responses is "custodial interrogation." *State v. Kong*, 883 P.2d 686, 690 (Haw. Ad.App. 1994). *Miranda* warnings need not be given unless and until the questioning agents have probable cause to believe that the person has committed an offense. *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir., cert. *denied*, 118 S.Ct. 731 (1997), citing *Stansbury v. California*, 511 U.S. 318 (1994). Doubts as to the presence or absence of custody should be resolved in favor of providing suspects with the *Miranda* warnings and a waiver thereof before interrogation continues. *United States v. Griffin*, 922 F.2d 1343, 1348, 1356 (8th Cir. 1990).

II. Waiver of *Miranda* Must be Voluntary, Knowing, and Intelligent

A valid waiver of rights under *Miranda* must be voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." *U.S. v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (citing *United States v. Pinion*, 800 F.2d 976, 980 (9th Cir. 1986)). A written or oral statement of waiver of the right to remain silent is not invariably necessary. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Rather, a waiver may be inferred from the actions and words of the person interrogated. *Id.*

The validity of a defendant's waiver of his Fifth Amendment rights after receiving *Miranda* warnings must be determined in each case by examining the facts and circumstances of the case such as the background, conduct, and experience of the defendant. *Anderson v. State*, 109 Nev. 1129, 1133, 865 P.2d 318, 320 (1993) (citing *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981)); *see also Stewart v. State*, 92 Nev. 168, 170-71, 547 P.2d 320, 321 (1976) (mere intoxication will not preclude the admission of a defendant's statements unless it is shown that the intoxication was so severe as to prevent the defendant from understanding his statements or his rights). The State must prove by a preponderance of the evidence that the defendant knowingly and intelligently waived his Fifth Amendment rights. *Scott v. State*, 92 Nev. 552, 554, 554 P.2d 735, 736-37 (1976) (citing *Lego v. Twomey*, 404 U.S. 477, 30 L. Ed. 2d 618, 92 S. Ct. 619 (1974)).

A waiver of *Miranda* and confession or consent almost always go hand in hand. To be admissible, a confession must be made freely and voluntarily, without compulsion or inducement. *Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). A confession must be the product of a free will and rational intellect. *Id.* at 213-14. Physical intimidation or psychological pressure constitute coercion, making a confession involuntary. *Id.* at 214. The voluntariness of a confession must be determined from the effect of the totality of the circumstances on the defendant's will. *Id.*, 735 P.2d at 323. This court has listed the following factors to be considered:

the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

Id.

The defendant's intoxication alone does not automatically make a confession inadmissible. *See, e.g., United States v. Casal*, 915 F.2d 1225, 1229 (8th Cir. 1990) (methamphetamine use for four days prior to arrest and confession), *cert. denied,* 499 U.S. 941, 113 L. Ed. 2d 455, 111 S. Ct. 1400 (1991); *Graves v. United States*, 878 F. Supp. 409, 414 (N.D.N.Y.) (alcohol consumption), *aff'd*, 89 F.3d 826 (2d Cir. 1995); *State v. Rivera*, 152 Ariz. 507, 733 P.2d 1090, 1096-97 (Ariz. 1987) (alcohol consumption); *Espinosa v. State*, 899 S.W.2d 359, 362 (Tex. Ct. App. 1995) (alcohol consumption). A confession "is inadmissible only if it is shown 'that the accused was intoxicated to such an extent that he was unable to understand the meaning of his comments.'" *Rivera*, 733 P.2d at 1097 (quoting *State v. Hicks*, 133 Ariz. 64, 649 P.2d 267, 275 (Ariz. 1982)). Similarly, a confession by a defendant suffering from drug withdrawal *may* be involuntary when the withdrawal results in a confession which is not the product of a rational intellect and a free will. *Pickworth v. State*, 95 Nev. 547, 549, 598 P.2d 626, 627 (1979). In *Pickworth,* this court concluded that the defendant's confession was voluntarily made where the withdrawal symptoms were minor, and the defendant was coherent, able to recall facts in great detail, and showed no signs of discomfort. *Id.*

III. *Miranda* Warnings Must Not be Stale

In analyzing whether the original *Miranda* warnings were stale by the time a defendant was interrogated a second time, we review the totality of the circumstances to determine whether the warnings were properly given and whether the accused voluntarily waived those rights. *Koger v, State*, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). In doing so, we consider

> "the time elapsed between the warnings and the interrogation which elicited the damaging response; whether the warnings and interrogations were conducted in the same or in different locales; whether the warnings and/or initial interrogation were conducted by the same person or persons who conducted the suspect interrogation; the extent to which the statements made by the accused in the later interrogation

differ in any substantial respect from those made at the former; the apparent emotional, physical and intellectual state of the accused at the later questioning."

Id. at 142, 17 P.3d at 431 (quoting *State v. Beaulieu*, 116 R.I. 575, 359 A.2d 689, 693 (R.I. 1976), *abrogated on other grounds by State v. Lamoureux*, 623 A.2d 9, 14 (R.I. 1993). We further note that so long as the accused is initially advised of his *Miranda* rights and understands them at the time of questioning, "there is no requirement that the warnings be repeated each time the questioning is commenced." *Taylor v. State*, 96 Nev. 385, 386, 609 P.2d 1238, 1239 (1980).

ARGUMENT

I. Interrogation by Detective Fernandes

a. *Miranda* was Required at the Start of Questioning

When Detective Fernandes first made contact with Engelson on July 15, 2017, she began a custodial interrogation. While Engelson had not been formally arrested, or handcuffed, yet, he was certainly not free to leave, nor was he allowed to freely move about the scene of the investigation. His movement was restricted. Due to the circumstances, the address at Manse Road almost immediately became flooded with law enforcement officers, who dominated the scene until they were satisfied the investigation was concluded. Ultimately, Engelson was formally arrested, and charged, at the conclusion of the questioning. These are all objective indicia that Engelson was under arrest from the moment questioning began, under the analysis in *Taylor*, necessitating the need for *Miranda* warnings to be read from the outset.

Furthermore, Engelson was immediately the sole suspect in the death of Yessenia Camp. The first thing the Nye County Sheriff's Office learned upon their arrival to the scene was that Yessenia had bruising all over her body and that Victoria claimed Engelson had killed her. Detective Fernandes began asking questions, knowing that it was reasonably likely to illicit incriminating responses. That makes it a custodial interrogation under *Kong*, and as such, *Miranda* warnings were required from the onset o

the questioning. Because *Miranda* was not read at this time, Engelson's statements made to law enforcement from the time the questioning began, until *Miranda* was read must be suppressed.

b. Engelson's Waiver of *Miranda* was not Voluntary, Knowing, and Intelligent

Engelson's statements after he was read *Miranda* must also be suppressed because his waiver was not voluntary, knowing, and intelligent. On the day of the incident, Engelson drank so much alcohol that he blacked out, causing him to remember very little, if any, of what happened. Detective Fernandes and Deputy Burke immediately noticed clear signs that he was intoxicated: he had an odor of alcohol on his person, his eyes were glossy, and he was unsteady when he walked to the point Deputy Burke had to assist him to keep him from falling down.

The State must show by a preponderance of the evidence that despite his intoxication, Engelson understood his statements and his rights. Based on his level of intoxication alone, the State cannot meet that burden. As we look at the totality of the case, it becomes clear that Engelson did not understand his rights or his statements, as much of what he told Detective Fernandes was inconsistent with the evidence found at the scene, and later statements Engelson made while sober. It is clear that Engelson did not understand his rights or his statements, and as such, his waiver of his *Miranda* rights was not voluntary, knowing, and intelligent. His statements must be suppressed.

II. Interrogation by Detectives Cox, Fancher, and Gibbs

a. Engelson's Waiver of *Miranda* was not Voluntary, Knowing, and Intelligent

All of Engelson's statements made to Detectives Cox, Fancher, and Gibbs must be suppressed because his waiver of *Miranda* was not voluntary, knowing, and intelligent. The facts make it clear that Engelson was clearly extremely intoxicated the night of July 15, 2017. His blood was drawn to determine his level of intoxication mere hours before the interview with Detectives began. Engelson was also extremely fatigued from sleep deprivation, as he had not slept continuously since July 14, 2017, only napping sporadically while incarcerated at the detention center. The totality of the circumstances caused his mental state to fall into such disarray that the detention center believed he was a threat to himself, a

evidence by his suicide smock. Despite all this, Detectives still flew by the reading of his *Miranda* rights, and then engaged in a four-hour long interview, during which all three Detectives took turns accusing Engelson of murder, calling him a liar, and pressuring him to confess to facts he could not remember. This interview never should have taken place, because due to his mental state, Engelson could not voluntarily, knowingly, and intelligently waive his *Miranda* rights. As such, his statements made to Detectives Cox, Fancher, and Gibbs must be suppressed.

III. Interrogation by Captain Boruchowitz

a. Prior *Miranda* Warnings Were Stale

When Captain Boruchowitz began his interview with Engelson, he was required to re-read Engelson his *Miranda* rights. This interview began 9-10 hours after the interview with Detectives Cox, Fancher, and Gibbs ended. Captain Boruchowitz was not present when Detective Fernandes or Detective Cox previously read Engelson his *Miranda* rights. He did not know the circumstances of the previous recitations to know whether *Miranda* was understood, or voluntarily waived. As set forth previously herein, *Miranda* was not voluntarily, knowingly, and intelligently waived during the previous interviews with Detectives. So, to assume Engelson still understood those rights to waive them would go against all established law. Such disputes should be resolved in favor of the Defendant, encouraging law enforcement to be cautious and read *Miranda*, as to ensure the rights of the accused are not being violated, rather than make flippant assumptions about prior circumstances and mental states of a suspect. Captain Boruchowitz was required to re-read *Miranda* to Engelson. Because he did not, Engelson's statements made to Captain Boruchowitz must be suppressed.

b. Engelson's Waiver of *Miranda* was not Voluntary, Knowing, and Intelligent

Even if *Miranda* was not stale when Captain Boruchowitz began his interview, Engelson could not have given a voluntary, knowing, and intelligent waiver. Engelson was pulled out of his cell, still wearing a green suicide smock. This tells us that Engelson's mental state was such that the jail believed he was a threat to his own safety. As a general rule, if the detention center, after booking and assessing

an inmate, determines that that inmate must be secluded from the rest of the jail population and put in a suicide smock, that inmates mental state is such that he or she cannot give a voluntary, knowing, and intelligent waiver of *Miranda* to interview with law enforcement. That is the case here. Engelson could not have given a legal waiver of *Miranda*, and as such, his statements must be suppressed.

CONCLUSION

When a subject is subject to a custodial interrogation, law enforcement must read the *Miranda* warnings. Those warnings must not be stale, and any waiver must be voluntary, knowing, and intelligent. There were three separate interviews done in this case, and in each of those interviews, at least one of those requirements was not met. As such, any and all statements made by Cole Engelson must be suppressed.

DATED this 4th day of June, 2020.

Daniel Martinez Law, LLC

Daniel E. Martinez, Esq.
Nevada Bar No.: 12035

DANIEL MARTINEZ LAW

CERTIFICATE OF SERVICE

I, Daniel E. Martinez, Esq., Nye County Public Defender and counsel for the Defendant, COLE D. ENGELSON, do hereby certify that I have served the following:

Defendant's Motion to Suppress Defendant's Statements in
Case No. CR9226
State v. Cole D. Engelson

upon said Plaintiff by delivering a true and correct copy thereof on June 4, 2020, to the following:

NYE COUNTY DISTRICT ATTORNEY'S OFFICE

Daniel E. Martinez, Esq.

DANIEL MARTINEZ LAW