

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**COLE DUANE ENGELSON**

Appellant,

vs.

**THE STATE OF NEVADA**

Respondent.

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**Docket No. 82691**

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

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**APPELLANT'S APPENDIX VOLUME 5 OF 22**

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<b><u>VOLUME</u></b>	<b><u>PLEADING</u></b>	<b><u>PGS</u></b>
1	Amended Information (2/7/2019).....	5-8
5	Amended Order Setting Jury Trial (9/14/2020).....	742-743
1	Brief in Support of Admitting Bad Act Evidence (11/25/2019).....	9-24
3	Court Order (7/8/2020).....	518-523
3	Court Order on Motion to Suppress (7/8/2020).....	524-528
1	Defendant Cole D. Engelson's Opposition to Bad Act Evidence (4/29/2020).....	43-51
1	Defendant's Formal Request for Pro Se Self-Representation (3/5/2020).....	30-39
1	Information (11/21/2018).....	1-4
22	Judgment of Conviction (3/12/2021).....	2175-2177
5	Motion to Disqualify the Nye County District Attorney's Office (10/27/2020).....	744-750
1	Motion to Suppress Defendant's Statements (6/4/2020).....	137-147
22	Notice of Appeal (3/26/2021).....	2178-2183
1	Notice of Motion and Motion for Deposition (2/10/22).....	25-29
2	Opposition to Defendant's Motion to Suppress Defendant's Statements, Pages 1-249 (6/12/2020).....	148-397
3	Opposition to Defendant's Motion to Suppress Defendant's Statements, Pages 250-307 (6/12/2020).....	398-454

6	Opposition to the Defendant’s Motion to Disqualify the Nye County District Attorney’s Office (10/29/2020).....	751-771
1	Order Appointing Counsel (3/30/2020).....	40-42
1	Reply to Opposition to Brief in Support of Admitting Bad Act Evidence (5/27/2020).....	52-60
1	Transcript of Proceedings Deposition of Christopher Pullen (5/21/2020).....	61-135
3	Transcript of Proceedings Defendant’s Motion to Suppress/Motion Admitting Bad Act Evidence/Calendar Call (7/6/2020).....	455-517
6	Transcript of Proceedings, Jury Trial Day 1 (11/4/2020).....	794-825
7	Transcript of Proceedings, Jury Trial Day 2 Pages 1-100 (11/5/2020).....	826-925
8	Transcript of Proceedings, Jury Trial Day 2 Pages 101-157 (11/5/2020).....	926-982
9	Transcript of Proceedings, Jury Trial Day 3 Pages 1-118 (11/6/2020).....	983-1100
10	Transcript of Proceedings, Jury Trial Day 3 Pages 119-194 (11/6/2020).....	1101-1176
11	Transcript of Proceedings, Jury Trial Day 3 Pages 195-275 (11/6/2020).....	1177-1257
12	Transcript of Proceedings, Jury Trial Day 4 Pages 1-100 (11/9/2020).....	1258-1357
13	Transcript of Proceedings, Jury Trial Day 4	

	Pages 101-176 (11/9/2020).....	1358-1433
14	Transcript of Proceedings, Jury Trial Day 5 Pages 1-100 (11/10/2020).....	1434-1533
15	Transcript of Proceedings, Jury Trial Day 5 Pages 101-190 (11/10/2020).....	1534-1623
16	Transcript of Proceedings, Jury Trial Day 6 Pages 1-110 (11/12/2020).....	1624-1733
17	Transcript of Proceedings, Jury Trial Day 6 Pages 111-212 (11/12/2020).....	1734-1835
18	Transcript of Proceedings, Jury Trial Day 7 Pages 1-70 (11/13/2020).....	1836-1905
19	Transcript of Proceedings, Jury Trial Day 7 Pages 71-127 (11/13/2020).....	1906-1962
20	Transcript of Proceedings, Jury Trial Day 8 Pages 1-80 (11/16/2020).....	1963-2042
21	Transcript of Proceedings, Jury Trial Day 8 Pages 81-153 (11/16/2020).....	2043-2115
6	Transcript of Proceedings, Motion to Disqualify the Nye County District Attorney's Office (10/29/2020).....	772-793
4	Transcript of Proceedings Petrocelli Hearing Day 1 (8/10/2020).....	529-639
5	Transcript of Proceedings Petrocelli Hearing Day 2 (8/11/2020).....	640-741

21	Transcript of Proceedings, Sentencing Hearing Day 1 (2/1/2021).....	2118-2132
22	Transcript of Proceedings, Sentencing Hearing Day 2 (3/8/2021).....	2133-2174
21	Verdict (11/16/2020).....	2116-2117

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FIFTH JUDICIAL DISTRICT

1 No. CR-9226

2 Dept. No. 2

AUG 25 2020

Nye County Clerk

Deputy

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4  
5 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
6 IN AND FOR THE COUNTY OF NYE

7 THE HONORABLE ROBERT W. LANE, DISTRICT JUDGE

8 -oOo-

9 ORIGINAL

10 THE STATE OF NEVADA, )

11 Plaintiff, )

12 vs. )

13 COLE DUANE ENGELSON, )

14 Defendant. )

TRANSCRIPT OF PROCEEDINGS  
PETROCELLI HEARING - DAY 2

AUGUST 11, 2020

1:20 P.M.

PAHRUMP, NEVADA

15  
16 APPEARANCES:

17 For the State:

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

18  
19 For the Defendant:

DANIEL MARTINEZ, ESQ. and  
RONNI BOSKOVICH, ESQ.  
DEPUTY PUBLIC DEFENDERS  
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Pahrump, Nevada 89048

20  
21 The Defendant:

COLE DUANE ENGELSON

22  
23  
24  
25 Reported by: CECILIA D. THOMAS, RPR, CCR No. 712

I N D E XWITNESSES FOR THE STATE:PAGEJOSHUA TETER

Direct Examination by Mr. Vitto

4

Cross-Examination by Ms. Boskovich

10

Redirect Examination by Mr. Vitto

15

CAPTAIN DAVID BORUCHOWITZ

Direct Examination by Mr. Vitto

25

Cross-Examination by Mr. Martinez

50

Redirect Examination by Mr. Vitto

58

VICTORIA SCHLICK

Direct Examination by Mr. Vitto

63

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E X H I B I T SSTATE'S:MARKEDADMITTED10 Photograph postmortem  
of Yessenia

8/10/20

7

11 Transcript of interview  
by Capt. Boruchowitz

8/10/20

34

14 Transcript of interview  
by Detective Fernandez

8/10/20

24

18A-J Photos of a deceased  
Yessenia

PTC\*

10

19 Cole's LG cell phone

PTC\*

65

20 Victoria's ZTE cell  
phone and one other

PTC\*

65

-oOo-

NOTE: (PTC\* - Exhibits marked prior to commencement  
of the proceedings.)

1 PAHRUMP, NYE COUNTY, NEVADA, TUESDAY, AUGUST 11, 2020

2 1:20 P.M.

3 -oOo-

4 P R O C E E D I N G S

5  
6 (Whereupon State's Proposed Exhibits 18A  
7 through 18J, 19, and 20 are marked for  
8 identification prior to commencement of the  
9 proceedings.)

10 THE BAILIFF: All rise.

11 THE COURT: Thank you. Please be seated.

12 Case No. 9226, Cole Engelson. And we're  
13 continuing our Petrocelli Hearing, and I'm ready to go  
14 when Mr. Vitto is.

15 MR. VITTO: Thanks, Judge. I will go get  
16 my first witness.

17 THE COURT: Thank you, sir.

18 MR. VITTO: Your Honor, the State calls  
19 Joshua Teter to the stand. Please step up to the  
20 witness chair, sir, and be sworn.

21 THE BAILIFF: Please raise your right hand.  
22 Whereupon,

23 JOSHUA TETER,  
24 called as a witness on behalf of the State, was sworn  
25 and testified as follows:



1 THE WITNESS: I do.

2 THE COURT: Thank you. Have a seat.

3 DIRECT EXAMINATION

4 BY MR. VITTO:

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

7 A. Joshua Teter, T-e-t-e-r.

8 Q. What is your occupation, sir?

9 A. I'm a deputy sheriff.

10 Q. Where are you currently employed?

11 A. Up in Curry County, Oregon.

12 Q. How long have you been in law enforcement?

13 A. About seven years.

14 Q. Let me direct your attention to July 15,  
15 2017. How were you employed on that day?

16 A. I was a deputy sheriff assigned to K9.

17 Q. With the Nye County Sheriff's Office?

18 A. Yes, sir.

19 Q. And how long had you been in their employ?

20 A. About a year-and-a-half.

21 Q. So let me direct your attention to  
22 approximately 7:15 that evening. Do you recall being  
23 dispatched to the Desert View Hospital locally?

24 A. I do.

25 Q. And for what purpose?

1 A. A report -- I was assigned to assist the  
2 patrol unit on a domestic for an unresponsive female.  
3 When I arrived, it was a juvenile.

4 Q. And your assignment on that date and time,  
5 you were a K9?

6 A. Yes, sir. I was in K9 training.

7 Q. Now, can you describe your first visual  
8 observation and impression regarding the child?

9 A. I observed pin-sized circle and oval shaped  
10 bruises from her foot all the way up to her forehead.  
11 I saw blood exiting her mouth. There was bruising on  
12 her back as well as her buttocks. And then the doctor  
13 showed me bruising on the back of her head just near  
14 the hairline.

15 Q. So you had opportunity to observe the  
16 child. What happened after that?

17 A. The funeral home showed up, Lee's Funeral  
18 Home. I placed toe tags on the body, put on the body  
19 bag, I put the seal on it, and they took the body to  
20 Clark County Coroner's Office.

21 Q. All right. And what happened after that?

22 A. I took some photos before that.

23 Q. You took some photos obviously before she  
24 left DVH?

25 A. Yeah.

1 Q. And taking the photographs and tagging the  
2 body and the bag, was -- did that pretty much conclude  
3 your involvement with the matter?

4 A. Yes, sir.

5 Q. So you photographed the little girl's body?

6 A. Yes, sir.

7 Q. Had you ever seen anything like that  
8 before?

9 A. I had not.

10 Q. Since?

11 A. No.

12 Q. Let me show you State's Proposed  
13 Exhibit 10. Go ahead and take a look at that. Do you  
14 recognize that?

15 A. I do.

16 Q. How do you recognize that?

17 A. That's one of the photos I took.

18 Q. Okay. And is it accurate?

19 A. Yes.

20 Q. What were you seeking to capture in that  
21 photograph?

22 A. I was capturing her injuries, because there  
23 was a lot of bruising. And the doctor told me he  
24 believed she passed due to trauma abuse.

25 Q. Okay. And in that particular photograph,

1 you were photographing the bruise to her chin area?

2 A. Yes, sir.

3 MR. VITTO: Your Honor, I would ask that  
4 State's Proposed Exhibit 10 be admitted into evidence.

5 THE COURT: Any objection?

6 MS. BOSKOVICH: Your Honor, I would object  
7 due to relevance at this point. Today we're here to  
8 discuss bad acts, alleged bad acts that the State is  
9 accusing Mr. Engelson of. This particular bruise of  
10 the decedent is irrelevant to any prior bad acts.

11 THE COURT: Mr. Vitto?

12 MR. VITTO: My response to that would be,  
13 as the Defense took great pains to point out, was that  
14 the lack of similarity between the incidents. In this  
15 photograph, as you're looking at the photograph, just  
16 to the left of the bruise that this officer was  
17 testifying, you can see the scar from the previous  
18 chin injury suffered by this child for which the Court  
19 has photographs in evidence regarding.

20 THE COURT: All right. It's admitted.

21 MR. VITTO: Thank you, Your Honor.

22 (Whereupon State's Exhibit No. 10 was  
23 admitted into evidence.)

24 Q. (By Mr. Vitto) Now, Deputy, I would like  
25 to show you what's been preliminarily marked as

1 State's Proposed Exhibits 18A through J?

2 MS. BOSKOVICH: Those are the copies you  
3 gave us?

4 MR. VITTO: Yes.

5 Q. (By Mr. Vitto) I would like you to take  
6 your time, go through those photographs. Let me know  
7 when you've had opportunity to review them, and I will  
8 ask you some questions on them.

9 Have you had opportunity to review those?

10 A. Yes, sir.

11 Q. Did you take those photographs?

12 A. Yes, sir.

13 Q. Are they accurate?

14 A. Yes, sir.

15 Q. A moment ago, you testified that your  
16 initial observation was pin-sized circular and oval  
17 shaped bruising from the bottom of her feet to her  
18 forehead. Is that what you were seeking to capture  
19 when you took those photographs?

20 A. I was trying to, yeah, and all of her other  
21 markings.

22 Q. I'm sorry?

23 A. All of her other markings, bruising.

24 MR. VITTO: Your Honor, I would ask that  
25 State's Proposed Exhibits 18A through J be admitted

1 into evidence.

2 MS. BOSKOVICH: Your Honor, I'm going to  
3 object to the admission of 18A through J, again citing  
4 to relevance. We're here today arguing prior bad  
5 acts. None of these photographs are alleged to have  
6 occurred from a prior bad act. It is simply more of  
7 the circular logic that Mr. Martinez was speaking to  
8 yesterday.

9 The State is trying to say that because of  
10 the bruises that were on the decedent's body, there  
11 were clearly no accidents; therefore, the prior bruise  
12 on the decedent's chin from April was no accident.  
13 It's circular logic. So it's the same arguments that  
14 Mr. Martinez was making yesterday. These have  
15 absolutely no relevance to the prior bad acts that  
16 we're here arguing. Yes, they may be admitted at  
17 trial, but for purposes of today's hearing, they're  
18 irrelevant.

19 THE COURT: Yeah. See, and I was going to  
20 say the same thing I said yesterday and make the same  
21 argument, which is maybe I would admit them at trial  
22 or maybe I wouldn't. I don't know. I don't want to  
23 prejudice the jury with them. I don't know. But  
24 there's not going to be any harm in admitting them  
25 right now.



1 I said yesterday that I thought Kirk was  
2 kind of presenting things piecemeal, and I imagine in  
3 his closing argument, he's going to explain how these  
4 things tie together and are part of his absence of  
5 mistake, argument, and so forth. And if there's  
6 anything he's getting in right now, like a picture of  
7 the girl that's irrelevant to that argument and to the  
8 evidence, I'll disregard it.

9 I would be much more safe -- err on the  
10 safe side if we had a jury. We don't, and I'm able to  
11 disregard irrelevant things. So because I don't know  
12 where he's going when he's going to wrap up these  
13 arguments, I'm going to allow it and admit it for this  
14 hearing.

15 (Whereupon State's Exhibits Nos. 18A  
16 through J are admitted into evidence.)

17 MS. BOSKOVICH: All right. Thank you,  
18 Judge.

19 MR. VITTO: Thanks, Judge. I have no more  
20 questions of this witness at this time.

21 CROSS-EXAMINATION

22 BY MS. BOSKOVICH:

23 Q. Good afternoon, Deputy.

24 A. Hello.

25 Q. So how long had you worked with the

1 Nye County Sheriff's Office?

2 A. A year-and-a-half. From the incident or  
3 total?

4 Q. Total.

5 A. About two years.

6 Q. And when the incident occurred, were you  
7 still in training?

8 A. I was in K9 training. We have a  
9 requirement every month to be certified to do 16 hours  
10 of training; so that's we were doing. There's 16  
11 hours monthly training for narcotics detection K9.

12 Q. But you had already passed all of your  
13 field training prior to that?

14 A. Yes. I was assigned to the K9 Unit.

15 Q. When did you leave the Nye County  
16 Sheriff's Office?

17 A. February, end of February 2018.

18 Q. Was that voluntary?

19 A. Yes.

20 Q. And did you receive any training in  
21 documenting physical injuries to an alleged victim?

22 A. Just what they taught us in training or the  
23 Academy to take photos.

24 Q. You want to expand on that for me?

25 A. Excuse me. Just use a measuring tape;



1 that's all, to make it accurate size. That's about  
2 it.

3 Q. Were you trained to use measuring tape on  
4 every single injury that you saw?

5 A. Tried to, yeah.

6 Q. Do you know how many injuries on the  
7 photographs that you took that day you used measuring  
8 tape on?

9 A. I don't recall.

10 Q. Do you have any idea how many photographs  
11 you took of the decedent?

12 A. I don't recall, but a lot.

13 Q. Does 82 sound right?

14 A. Could be; I don't know. I know there was a  
15 lot.

16 Q. And of those 82 photographs, do you have  
17 any idea how many you used measuring tape on?

18 A. I do not.

19 Q. Would it surprise you if you only measured  
20 nine injuries?

21 A. Nope.

22 Q. And what was the policy on documenting  
23 physical injuries?

24 A. I don't recall the policy.

25 Q. Was there specific training on documenting

1 physical injuries of a deceased victim?

2 A. We just do the basic, and then the  
3 detectives do the more in-depth.

4 Q. You said the detectives do the more  
5 in-depth?

6 A. Yes, ma'am. They have the training.

7 Q. Okay. When you arrived at Desert View  
8 Hospital, did you stay with the decedent the entire  
9 time?

10 A. Yes.

11 Q. And you had never met decedent before that  
12 day?

13 A. No.

14 Q. You had never met Cole?

15 A. No.

16 Q. You had never Victoria --

17 A. No.

18 Q. -- the mother of the decedent?

19 A. No.

20 Q. Did you meet her that day?

21 A. Yes.

22 Q. How long after you arrived at Desert View  
23 Hospital until you began taking photographs?

24 A. Until they were done doing CPR and all of  
25 that.

1 MR. VITTO: Your Honor, may the witness --  
2 can you instruct the witness. If the court reporter  
3 is having difficulty understanding him, he can pull  
4 the mask over his chin.

5 THE COURT: You're allowed to remove your  
6 mask when you talk into the microphone so everybody  
7 can hear you better, since you're more than six feet  
8 from anybody.

9 THE WITNESS: Okay.

10 Q. (By Ms. Boskovich) And specifically in  
11 regards to a deceased victim, what kind of things are  
12 you trying to take photographs of?

13 A. The injuries, bruising.

14 Q. So you only take photographs of a deceased  
15 victim if there are injuries and bruising?

16 A. Can you repeat that?

17 Q. So you only take photographs of a deceased  
18 victim if there are injuries or bruising?

19 A. I wasn't at the scene it occurred at; so  
20 that's all I had.

21 Q. And you never did go to the scene of the  
22 incident; correct?

23 A. No, ma'am.

24 Q. Did you review any other officers' reports  
25 in regards to this incident?

1 A. No, ma'am.

2 Q. And you never spoke to the defendant?

3 A. No, ma'am.

4 Q. Did you speak to any other witnesses about  
5 the incident?

6 A. No, ma'am.

7 MS. BOSKOVICH: I'll pass the witness,  
8 Your Honor.

9 MR. VITTO: Just a little bit.

10 REDIRECT EXAMINATION

11 BY MR. VITTO:

12 Q. Deputy, did failure to measure the bruise  
13 cause the bruise to change in any way?

14 A. I don't believe so.

15 Q. Did it get bigger because you didn't  
16 measure it?

17 A. I do not believe so.

18 Q. Did it get smaller because you didn't  
19 measure it?

20 A. I don't believe so.

21 Q. Did it change color because you didn't  
22 measure it?

23 A. I don't believe so.

24 Q. So any failure to measure the bruise had  
25 absolutely no effect on the bruise itself?

1 A. I believe correct.

2 MR. VITTO: Nothing further.

3 THE COURT: Anything else?

4 MS. BOSKOVICH: No, Your Honor.

5 THE COURT: Thank you. You can step down.

6 MR. VITTO: Judge, at this time I'd like to  
7 make an offer of proof, something specifically allowed  
8 for by the seminal case in this area, Petrocelli;  
9 Petrocelli being referenced specifically for this  
10 purpose by Salgado v. State, 114 Nevada 1039, a 1998  
11 decision. It allows the State to present evidence by  
12 way of offer of proof.

13 Detective Fernandez can't be with us today.  
14 You have her transcript, Judge. You have actually  
15 ruled on the Defense Motion to Suppress. So at this  
16 time making an offer of proof, I would like to go  
17 through that transcript to point out some things that  
18 I would ask this Court to consider as it considers the  
19 basis for my motion.

20 THE COURT: Any objection?

21 MR. MARTINEZ: I guess it doesn't make a  
22 difference if he is going to do that now or in his  
23 closing, Your Honor. Either way, he's going to get to  
24 do it. I know that the transcript is already a part  
25 of the record due to it being attached in a motion

1 previously.

2 MR. VITTO: Do you guys have a copy to  
3 follow along?

4 MR. MARTINEZ: I do.

5 MR. VITTO: Judge, do you have a copy to  
6 follow along.

7 MS. BOSKOVICH: What exhibit is that?

8 MR. VITTO: Oh, this is Exhibit 14. And I  
9 will try to get through this as fast as I can without  
10 speaking so quickly that -- maybe I should do this.  
11 Tell me when you're ready, Judge. I'm going to start  
12 off with page 3.

13 THE COURT: Kirk, I hate to do this to you.

14 MR. VITTO: That's okay.

15 THE COURT: Help me find it.

16 MR. VITTO: Sure, sure. Judge, it's on the  
17 way.

18 THE COURT: Thank you, sir. You can go  
19 ahead and get started if you want.

20 MR. VITTO: All right. On page 3 of  
21 Alexander's interview with the defendant, the  
22 defendant explains that he had given Yessenia a bath,  
23 he was drying her off, and she was unresponsive;  
24 doesn't know what happened. "I really don't. She  
25 wasn't unresponsive in the tub. She was fine when we



1 got out. I came back and started drying her off, and  
2 she was limp."

3 On page 4, in response to being asked, "You  
4 were drying her off. How was she positioned," he  
5 said, "I always put her on the counter to dry her off.  
6 I was drying her off. She was nodding out, and she  
7 became limp. That's when I called her mom. I really  
8 don't know after that."

9 Fernandez asked him how much he had to  
10 drink. He said, "I just tossed a couple of drinks,  
11 and we were supposed to lay down together and have a  
12 nap and go to bed, me and her, Yessenia."

13 On page 6, detective Alexander Fernandez  
14 asks the defendant who else was home with him at that  
15 time. He said, "Nobody."

16 "So it was just you and the baby?

17 "Yeah."

18 Fernandez asks, "Was she like fussy or  
19 showing any signs of like distress?

20 "I couldn't say that at all. I couldn't  
21 say that.

22 "Couldn't say what?

23 "I couldn't say she was fussing or  
24 anything, like being aggressive or anything like that.  
25 I couldn't say."

1           On page 8, Fernandez asks, "And she was  
2 standing on the counter?" And the defendant responds,  
3 "Yeah, always. Always standing her up. And when I  
4 stood her up, she was unresponsive."

5           Continuing on to page 9, the defendant  
6 says, "So I don't know if she fell down, then I picked  
7 her up and she was unresponsive or -- I really don't  
8 know."

9           "Okay. Do you think she fell down?"

10          "She might have." The defendant said, "I  
11 always put her on the counter." Alex asks, "On the  
12 counter whereabouts?" He said, "I usually put her  
13 right where the brush is standing."

14          On page 10, "And I stand her up. That's  
15 where I usually dry her off and I lotion her up."  
16 Alexander responds, "Okay, okay. So my problem is I'm  
17 not seeing any feet marks on the counter. So that's  
18 kind of a concern for me." And the defendant  
19 responds, "Okay, like -- like I said, it all happened  
20 so quick, I don't really know what happened."

21          Alexander asks, "Show me the glass that you  
22 had your alcohol in." The defendant responds, "It's  
23 probably in the kitchen." That's page 10. He  
24 explains he rinsed the glasses out, because  
25 Detective Fernandez said they don't smell like there's



1 been any alcohol in them. Alexandra asks, "Show me  
2 how full you fill those glasses.

3 "Well, not that much, you know. I fill  
4 them up to here and then rest water." The detective  
5 asked him, "You had two?" The defendant says, "Yes."

6 Judge, I'm on page 12 now.

7 (The clerk brings in a copy of the  
8 transcript for the Judge.)

9 THE COURT: Thank you, sir.

10 Q. (By Mr. Vitto) And on page 12, the  
11 detective asks, "So it was just you and your daughter  
12 here alone?

13 "Yes.

14 "For the day? From about what time?"

15 The defendant says, "I would say maybe  
16 two o'clock on?" He was getting ready to give her a  
17 nap. So he tells Detective Fernandez he had two  
18 glasses, two drinks. And if you'll remember from the  
19 deposition of Christopher Pullen, Christopher Pullen  
20 testified that the defendant told him that he had 30  
21 shots of vodka. Page 14, Judge.

22 THE COURT: Is that Engelson 1014  
23 (phonetic) on the bottom?

24 MR. VITTO: Yes -- no. That was --

25 MS. BOSKOVICH: That would be 1018.

1 MR. VITTO: I'm now on Engelson 1018.

2 THE COURT: All right. And I see where  
3 that it's numbered now 14.

4 MR. VITTO: Yeah.

5 THE COURT: Okay.

6 Q. (By Mr. Vitto) He says he feels bad. "I  
7 really don't know what happened. I really don't."

8 On page 15, the defendant explains that he  
9 showered her first prior to taking a nap -- or prior  
10 to planning on taking a nap. Victoria left around  
11 one o'clock. They were going to get their nails done.

12 Skipping ahead to page 20, that's Engelson  
13 1024, lines 9 through 11. The defendant says, "After  
14 trying to revive her by smacking her on the face a  
15 little bit, like, 'Hey, hey, hey, hey,'" he says, "I  
16 called her mom. I don't know if I called paramedics  
17 first, but there was something wrong and I did it."

18 Skipping ahead to page 23, at the top of  
19 page 23, Judge, the defendant says, "I told you  
20 everything I really do know. Like I said, when she  
21 was unresponsive, then I called her mom right away.  
22 So I don't know what happened before that." He says,  
23 "I don't know what happened before that. I really --  
24 I couldn't tell you, you know. I just came to after  
25 the fact."

1 But if you skip down to the bottom of the  
2 page, he begins to describe his very bad terrible day  
3 that he had. He had worked a long day, works in  
4 Vegas, got home, "I came home, and I took the kids out  
5 to breakfast"; so his memory was intact then. "I came  
6 home and, like, I set up an appointment for my old  
7 lady and her oldest daughter to get her nails done";  
8 so he remembers that. And he remembers that the  
9 youngest was supposed to take a nap during that time.

10 He remembers driving back from getting  
11 something to eat, and he wanted to stop and have a  
12 beer. They stopped at a convenience store. He had  
13 wanted to grab a beer, but his old lady was giving him  
14 trouble about it so he didn't. So then they got back  
15 and he snuck a drink out of the cabinet, probably two  
16 of them, and then he just goes blank.

17 But he remembers that Yessenia was fine  
18 going into the shower, and then when she got out of  
19 the shower and he was drying her off, she just went  
20 limp. Detective Fernandez, at 25, asked him if he  
21 blacks out when he drinks, and he says he has -- or "I  
22 have." Talks about his taking antabuse because he's  
23 recovering. He really doesn't drink that much.

24 Page 27, he describes how he'll have an  
25 episode, "Then I get right back on it because I -- I

1 hate myself." The detective asks him, "When was the  
2 last time that you saw her and she was okay?" And he  
3 responds, "I -- I made the shower. I really -- I  
4 couldn't tell you."

5 Page 32, Engelson 1036, Detective Fernandez  
6 asks, "How was she acting today?"

7 "Just normal, bubbly self.

8 "Was she like crabby and just like  
9 (something incomprehensible)?"

10 And the defendant said, "No. She was --  
11 she was fine."

12 "She was fine?"

13 "You know, went in the room, put her down  
14 for a nap to let her mom go get her nails done. I  
15 don't -- I don't think anything else happened after  
16 that." Well, when you see the photographs of Yessenia  
17 taken by Josh Teter in the hospital, something  
18 happened after that. And when David Boruchowitz takes  
19 the stand, we'll get into that.

20 Detective Fernandez, on page 32, asked if  
21 he would be willing to give consent for a blood draw  
22 to see what your alcohol level is, and he explained  
23 that he would rather not do that. "It's already been  
24 a bad day for me." It was a bad day for Cole that  
25 day. It was a worse day for Yessenia. Cole is here.

1 I would ask that State's Proposed  
2 Exhibit 14 be admitted into evidence, Judge?

3 THE COURT: Any objection?

4 MR. VITTO: For purposes of this hearing.

5 MR. MARTINEZ: I don't think I have a legal  
6 basis to object for purposes of this hearing, Judge.

7 THE COURT: Just like a lawyer, ten words  
8 to say no.

9 MR. MARTINEZ: I've been working with  
10 Mr. Vitto too much, Judge. He's rubbing off on me.

11 THE COURT: It's admitted.

12 MR. VITTO: Thank you.

13 (Whereupon State's Exhibit No. 14 was  
14 admitted into evidence.)

15 MR. VITTO: My next witness, Your Honor, is  
16 Nye County Sheriff's Office Captain David Boruchowitz.

17 THE COURT: Good afternoon.

18 THE WITNESS: Good afternoon, Judge. How  
19 are you?

20 THE COURT: Good. We'll have you raise  
21 your right hand and be sworn.

22 Whereupon,

23 CAPTAIN DAVID BORUCHOWITZ,  
24 called as a witness on behalf of the State, was sworn  
25 and testified as follows:

1 THE WITNESS: I do.

2 THE COURT: Thank you, sir. Have a seat.  
3 The attorneys will take turns asking questions.

4 THE WITNESS: Thank you, Judge.

5 DIRECT EXAMINATION

6 BY MR. VITTO:

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

9 A. David Boruchowitz, B-o-r-u-c-h-o-w-i-t-z.

10 Q. What is your occupation, sir?

11 A. I'm a captain with the Nye County  
12 Sheriff's Office.

13 Q. How long have you been captain?

14 A. July 29th of last year.

15 Q. And how long have you been employed with  
16 the Nye County Sheriff's Office?

17 A. February 6th of 2006.

18 Q. And how long have you been in law  
19 enforcement?

20 A. February 3rd of 2003, I believe.

21 Q. How were you employed July 16, 2017?

22 A. I had just been promoted to lieutenant.

23 Q. Did you bring some items of evidence with  
24 you today?

25 A. I did.



1 Q. From whence did you retrieve those items?

2 A. From the Nye County Sheriff's Office  
3 Evidence Vault.

4 Q. And you got them from the evidence vault  
5 and brought them here today?

6 A. Correct.

7 Q. Have they been in your sole care, custody,  
8 and control from the time you got them at the evidence  
9 vault until this moment?

10 A. They have.

11 MR. VITTO: Your Honor, I would ask that  
12 the exhibits that he has with him be marked so that we  
13 can address them.

14 THE COURT: That will be fine.

15 MR. VITTO: May the record reflect that  
16 Captain David Boruchowitz has handed the two exhibits  
17 to me. I'm walking them to the clerk to have them  
18 marked as State's Proposed Exhibits next in line -- 19  
19 and 20, if I'm not mistaken.

20 THE CLERK: Yes.

21 (Mr. Vitto shows the exhibits to  
22 Defense Counsel.)

23 Q. (By Mr. Vitto) Captain, I notice that the  
24 bags themselves seem a little different to me. Is  
25 there a reason for that? Is it just they're a

1 different color bag? Do they have some kind of  
2 purpose?

3 A. These are bags that are intended to prevent  
4 radio frequency signals to electronic devices. So  
5 that if there's evidence on there that somebody  
6 couldn't tamper with them remotely through the bags  
7 with modern technology.

8 Q. And do you know of instances where that has  
9 actually happened?

10 A. Just by story. I haven't had any personal  
11 experiences with it.

12 Q. All right. Now, again, directing your  
13 attention to -- actually, let's do this first.  
14 There's some photographs in front of you, State's  
15 Exhibits 10, and 18A through J. I would like you to  
16 go ahead and review those photographs. Let me ask you  
17 a couple of questions about them.

18 A. Okay.

19 Q. Have you had opportunity to review those?

20 A. I did.

21 Q. Do you recognize them?

22 A. Yes.

23 Q. Are they accurate?

24 A. They appear to be pictures of the way I saw  
25 Yessenia that night, yes.



1 Q. Okay. You saw Yessenia at Desert View  
2 Hospital?

3 A. Yes.

4 Q. Were you there when Teter was there?

5 A. I don't have a recollection. I believe I  
6 was since he was the deputy, but I don't recall.

7 Q. But that's your recollection of how  
8 Yessenia looked that night at the hospital?

9 A. Yes.

10 Q. Let's go to July 16, 2017. Do you recall  
11 having contact with Cole Duane Engelson?

12 A. I do.

13 Q. Do you see him in the courtroom today?

14 A. I do.

15 Q. Describe an article of clothing he's  
16 wearing.

17 A. He's wearing the jail jumpsuit.

18 MR. VITTO: May the record reflect the  
19 identification of the defendant by this witness?

20 THE COURT: Yes, it will.

21 Q. (By Mr. Vitto) Captain, what was the  
22 purpose of that contact with the defendant on that  
23 date?

24 A. It was in essence follow-up. I was  
25 assisting with the investigation of the death of

1 Yessenia.

2 Q. And how were you involved? What was your  
3 capacity in law enforcement at the time?

4 A. I was, in layman's terms, a watch  
5 commander.

6 Q. Now. Showing you State's Proposed  
7 Exhibit 11. Thumb through that. Let me know when  
8 you've had the opportunity to review it. Let me ask  
9 you some questions about it.

10 A. I'm ready when you are.

11 Q. All right. Does that appear to be an  
12 accurate transcript of your interview with the  
13 defendant?

14 A. Yes. It appears to be an accurate copy of  
15 the transcript.

16 Q. Do you recall what the defendant said about  
17 disciplining Yessenia's brother Dwight?

18 A. Yes.

19 MR. MARTINEZ: I apologize, Judge. I  
20 objected to this line of questioning yesterday. I'm  
21 just making a record. I know the Court is going to  
22 overrule me and allow Captain Boruchowitz to answer  
23 the question. I just want to make my record that I am  
24 objecting.

25 THE COURT: Preserve it. I understand.

1 Thank you, sir.

2 MR. MARTINEZ: Thank you, Judge.

3 Q. (By Mr. Vitto) What did the defendant say  
4 about disciplining Yessenia's brother Dwight?

5 A. In essence, he said that he didn't do it  
6 anymore because he was afraid once he started, he  
7 wouldn't stop.

8 Q. Do you recall what he said about  
9 disciplining Yessenia?

10 A. Yes. He said that -- he specifically  
11 brought attention to one specific event where he had  
12 spanked her, and I think the phrase was that "you  
13 could tell from that slap that it was too hard" or  
14 something to that effect. In essence, he was  
15 recalling a slap that he felt was took too far.

16 Q. All right. Now, at one point the defendant  
17 uses the phrase "midget kick"; do you recall that?

18 A. I do.

19 Q. What was that in reference to?

20 A. He was describing his efforts to keep  
21 Yessenia in the shower despite her efforts to get out.  
22 And the easiest description would be that he kind of  
23 showed that it was like almost a punt of a football  
24 that he was just kind of trying to kick her back in  
25 the shower.

1 Q. Did he demonstrate the kick to you?

2 A. He did.

3 Q. So he demonstrated the kick that he used to  
4 keep her in the shower?

5 A. Correct.

6 Q. He remembered that, didn't he?

7 A. Yes.

8 Q. Did he remember her screaming and trying to  
9 get out?

10 A. Yes. He several times mentioned that she  
11 was trying to get out. He used the phrase that she  
12 was like a cat trying to get out of a shower, which  
13 you would expect a cat to react when you were trying  
14 to keep her in the shower. There were several  
15 different times that he referenced her efforts to  
16 escape the shower.

17 Q. So he remembered the interaction between  
18 himself and Yessenia while Yessenia was in the shower?

19 A. Correct.

20 Q. Do you recall how he self-described when it  
21 came to disciplining -- when it came to discipline?

22 A. Yes. I believe he used the word  
23 heavy-handed.

24 Q. He described himself as heavy-handed?

25 A. Correct.

1 (A person enters the courtroom and  
2 Mr. Vitto converses with Defense Counsel.)

3 MR. VITTO: Your Honor --

4 (Conversing with unknown person.)

5 MR. VITTO: Your Honor, Amber is in the  
6 courtroom; it's Victoria sister. And I would just ask  
7 the Court just out of an abundance of caution -- she's  
8 not a witness in this case. She's not on any witness  
9 list. I would ask, nonetheless, ask the Court to  
10 admonish her not to discuss anything that she hears  
11 inside the courtroom with Victoria or anybody else at  
12 this point.

13 VOICE IN THE AUDIENCE: And I'm sorry.  
14 It's Amy, and I'm one of her friends.

15 MR. VITTO: I'm sorry. I'm sorry.

16 VOICE IN THE AUDIENCE: It's okay.

17 THE COURT: Amy. And you're a friend?

18 VOICE IN THE AUDIENCE: I'm just a friend.

19 MR. VITTO: Just a friend, sorry.

20 THE COURT: But nonetheless, Amy, it's  
21 normal for people to come and want to see and hear  
22 things and so forth. I'm admonishing you not to go  
23 talk with her about it. We're keeping her out of the  
24 courtroom, because we don't want her to hear the  
25 testimony. And if you share it with her, you're

1 violating that rule.

2 VOICE IN THE AUDIENCE: Okay.

3 THE COURT: You could be sanctioned.

4 All right. Thank you.

5 Q. (By Mr. Vitto) So we left off he described  
6 himself as heavy-handed. Do you remember anything  
7 else about his -- whether he said anything to the  
8 effect that he didn't want to hit this kid anymore.

9 A. He said that about both Yessenia and her  
10 brother that in essence, he just felt like he didn't  
11 want to do it anymore; that he couldn't stop himself,  
12 things of that nature, throughout the interview.

13 Q. All right. Do you remember if he described  
14 for you how Yessenia reacted when her mom left?

15 A. Yes. He described that when she left, that  
16 Yessenia immediately began crying.

17 Q. Okay. So what did he say? What did he  
18 tell you about how Yessenia died?

19 A. Well, that changed a couple of times, which  
20 is there --

21 Q. Well, let's start with the beginning.

22 A. Okay. So originally, he had virtually no  
23 recollection, could really provide no answers, and it  
24 was just kind of, in essence, there was a bunch of  
25 unknowns. Ultimately, that progressed to the story of



1 then, I think his words were "going at it in the  
2 shower" and that altercation that we've discussed  
3 already. And then near the end in a couple of  
4 different ways, he basically took ownership for it and  
5 said that he was her caretaker, he was the only one  
6 there, it's on his watch, it's his fault -- things of  
7 that nature kind of was how it ended.

8 Q. All right. So let me see State's Proposed  
9 Exhibit 11.

10 MR. VITTO: And, Judge, I would move  
11 State's Proposed Exhibit 11 into evidence for purposes  
12 of this hearing.

13 THE COURT: Without objection, it's  
14 granted.

15 MR. VITTO: Thanks, Judge.

16 (Whereupon State's Exhibit No. 11 was  
17 admitted into evidence.)

18 Q. (By Mr. Vitto) Captain, do you remember  
19 the defendant telling you that he threw Yessenia in  
20 the shower?

21 A. Yes.

22 Q. Was that his word, that he "threw" her into  
23 the shower?

24 A. During one of the renditions, yes, that he  
25 threw her in the shower.



1 Q. And then I think that you testified  
2 previously that she reacted like a cat thrown in the  
3 bathtub?

4 A. Yeah. And that -- yes.

5 Q. Do you remember him telling you that she  
6 was falling all over the place?

7 A. Yes.

8 Q. Trying to get out?

9 A. Right. The way he was describing it was  
10 that she was trying to get out of the shower, he was  
11 trying to keep her in the shower, and basically that's  
12 when he, I think, used the reference to the cat in the  
13 shower or the bathroom.

14 Q. And do you remember him saying, "I wasn't  
15 even touching her at first"?

16 A. Yes. He said that.

17 Q. And what was that in context? Did he then  
18 explain what he did after whatever first was?

19 A. I believe that was when he then referenced  
20 the fact that things may have escalated after that.  
21 And basically that kind of is where his memory started  
22 to fall apart.

23 Q. And at one point was he describing an  
24 actual physical fight between the two of them?

25 A. Yes. I think his words were "they went at

1 it." Him and her were going at it, I think was the  
2 quote.

3 Q. At some point did he try to blame it on the  
4 alcohol?

5 A. Yes, yes. At some point he referenced that  
6 as a fact.

7 Q. How much did he tell you he weighed?

8 A. I believe it was 350 pounds.

9 Q. And how old was Yessenia when she died?

10 A. Three years old.

11 Q. But he told you he specifically doesn't  
12 remember a single strike?

13 A. Yes. He did make that statement.

14 Q. Now, what was the context for his saying he  
15 didn't remember a single strike?

16 A. So after we had gone back and forth on  
17 several of these different accounts, I believe I  
18 showed him some pictures of her body and some of the  
19 injuries. And his reference was that he couldn't have  
20 done that sober to her basically and that he must have  
21 had too much to drink, because there's no way that he  
22 could think that he could do that sober.

23 Q. And the pictures that you showed him, are  
24 those pictures similar to what we have before you?

25 A. Yes, very.

1 Q. Maybe even exactly those pictures?

2 A. It could be. There were numerous pictures.  
3 I don't know which ones we specifically used.

4 Q. Do you remember upon being shown those  
5 pictures that he said, "It looks bad"?

6 A. Yes. I believe that was his initial  
7 reaction.

8 Q. And I think you testified that he  
9 explained, after initially not remembering anything  
10 about the shower, that she was trying to bail out?

11 A. Yes. I mean he described that that was  
12 that whole going-at-it part was her trying to escape  
13 and him pushing and doing the little kick thing to  
14 keep her in the shower.

15 Q. Do you remember his saying, quote, I just  
16 went right at it and didn't give her a warning or  
17 anything, and then she was trying to bail out of  
18 there?

19 A. Yes. He was describing the start of it,  
20 and it was that he had basically thrown her in the  
21 shower with no warning. He described that she  
22 basically was just screaming and fighting the whole  
23 time, and he kind of attributed it to the fact that he  
24 had just thrown her in without giving her advance  
25 notice.

1 Q. All right. Did you talk about the time  
2 frame insofar as in relation to when Victoria left,  
3 when was the shower; did you talk with him about that?

4 A. I did.

5 Q. And what did he say?

6 A. I believe he said he believed that Victoria  
7 had left at one o'clock, and I think it was a half  
8 hour was when he referenced that the shower would have  
9 occurred after her leaving.

10 Q. Are you aware that the water in the shower  
11 was running when medical personnel and law enforcement  
12 personnel arrived after 7:00 p.m.?

13 MR. MARTINEZ: I'm going to object to  
14 foundation here, Judge.

15 MR. VITTO: I'm just asking if he was  
16 aware.

17 MR. MARTINEZ: But the fact is not entered  
18 in evidence anywhere; so there's no foundation to ask  
19 that question.

20 MR. VITTO: Actually, it is in evidence.

21 THE COURT: It's all right. Overruled.

22 Do you have any knowledge of the water  
23 running when they arrived at 7:00?

24 THE WITNESS: I was told about that, yes.

25 THE COURT: You were told that by?

1 THE WITNESS: I couldn't tell you.

2 MR. MARTINEZ: My objection here is hearsay  
3 then, Judge.

4 THE COURT: Sustained.

5 MR. VITTO: Thanks, Judge. I will point  
6 out for the record that that fact or those facts are  
7 established within the transcript that is in evidence  
8 between Alexander Fernandez and the defendant that  
9 when Detective Fernandez arrived on scene, asked where  
10 the shower was, the defendant took her to the shower,  
11 and the water was still running.

12 Q. (By Mr. Vitto) Do you recall the defendant  
13 saying anything about the situation amping up?

14 A. Yes. I believe the reference to that was  
15 he said something to the effect of, "I didn't even  
16 touch her yet," or something like that, "and it may  
17 have amped up after that," I think was the reference  
18 to that. I would have to look at the transcript if  
19 you need an exact quote.

20 Q. I understand. But he did reference that  
21 she was screaming the whole time?

22 A. Yes.

23 Q. Did he describe Yessenia accidentally  
24 falling while in the shower?

25 MR. MARTINEZ: Objection; Your Honor,

1 description of accidentally.

2 THE COURT: I didn't hear you.

3 MR. MARTINEZ: The description of  
4 accidentally.

5 MR. VITTO: I think "accidentally" is an  
6 easily understood word.

7 THE COURT: Did the defendant describe to  
8 you, Captain Boruchowitz, that the child accidentally  
9 fell in the shower?

10 MR. MARTINEZ: And, Judge, I think an  
11 appropriate question is did he describe the child  
12 falling in the shower?

13 THE COURT: Unless the defendant said to  
14 Boruchowitz the defendant -- the child accidentally  
15 fell in the shower.

16 MR. MARTINEZ: Agreed, Judge.

17 THE COURT: That's what I'm asking.

18 THE WITNESS: I believe -- I would have to  
19 look at the transcript, but I believe he did use the  
20 word "accidentally" when he was describing her falling  
21 on her ribs trying to get out of the shower. But the  
22 reference was about during this whole fight; so I  
23 would not take it as accidentally, but I believe he  
24 did portray that.

25 MR. VITTO: I can ask it a different way.



1 Q. (By Mr. Vitto) Did the defendant tell you  
2 that he body slammed Yessenia in the shower?

3 A. No.

4 Q. Did he tell you that he purposely knocked  
5 her to the ground in the shower?

6 A. His description of the midget kick might  
7 fit into that category.

8 Q. But I described Yessenia falling in the  
9 shower, didn't he?

10 A. He did.

11 Q. But he didn't take ownership of that like,  
12 "Oh, this is how she died"?

13 A. No. He never would take ownership for  
14 that.

15 Q. Do you remember him saying that he would  
16 love to clear it up for everybody?

17 A. He did. I asked him if he could give me  
18 some answers I think, and that was his response.

19 Q. He just couldn't remember?

20 A. That specific portion, yes.

21 Q. Did he tell you what happened after the  
22 shower?

23 A. I don't recall. I would have to look at  
24 the transcript to refresh my memory.

25 Q. All right. Did you ask him why he didn't



1 just let her out of the shower?

2 A. I did.

3 Q. And what did he say?

4 A. Something to the effect of that she wasn't  
5 done, and I think he said that she hadn't washed her  
6 hair yet and that was why he was keeping her in.

7 Q. In regard to potentially drinking, do you  
8 remember him saying that, quote, Just went too far,  
9 unquote?

10 A. Yes. That was one of his statements.

11 Q. And did he say anything to you about  
12 pushing her head back?

13 A. Yes. That was in the same description of  
14 the fighting, going at it, the cat in the bathtub type  
15 reference; that she was basically trying to get out,  
16 and he had pushed her head back to kind of get her  
17 back into the shower.

18 Q. So there was a time when he said he kicked  
19 her back into the shower, and then there was a time he  
20 said that he pushed her head back into the shower.  
21 With his hand?

22 A. I don't believe he referenced with what at  
23 that point.

24 Q. Okay. Did he demonstrate it at all?

25 A. I don't believe so. I would have to

1 double-check the transcript, but I don't believe he  
2 did.

3 Q. So he just said he pushed her head back?

4 A. Yes. I believe so.

5 Q. After seeing the pictures, did he say  
6 anything about being upset and whether he could be  
7 that upset if he was sober, anything along those lines  
8 that you recall?

9 A. Yeah. I think I previously testified to  
10 it. I believe his reference was that he couldn't have  
11 done that sober and that he had obviously been  
12 drinking in order for that to have happened.

13 Q. But in respect to pushing her head back,  
14 that he, quote-unquote, gave her one of those little  
15 shoves, get-back-in-there kind of things. He  
16 remembered that; right?

17 A. He did. Several references to things of  
18 that nature.

19 Q. And that maybe the, quote-unquote, booze  
20 made him angry?

21 A. That was near the end in that portion where  
22 he was talking about how he didn't remember, but  
23 obviously, he had been drinking too much.

24 Q. Captain, how many suspect interviews have  
25 you conducted in your law enforcement career?

1 A. I would be guessing thousands of some sort.

2 Q. You've had training?

3 A. I have.

4 Q. Classes?

5 A. I have.

6 Q. Seminars involving interview technique?

7 A. Yes, sir.

8 Q. How many?

9 A. Estimating 20 -- 15, 20.

10 Q. Have you specifically learned about a  
11 suspect minimizing his involvement?

12 A. I have.

13 Q. What can you tell me about that concept?

14 A. So traditionally when you're interviewing a  
15 suspect and they -- well, traditionally, they want to  
16 tell you their story. However, when the crime has  
17 either a significant consequence or a significant  
18 emotional consequence, they often will admit to the  
19 crime that you're interviewing them about and will  
20 minimize their involvement. It is a technique, a  
21 human technique where you don't like to admit that you  
22 did something horrible, and so traditionally the  
23 suspects will minimize the effects of what they  
24 actually did.

25 Q. And have you seen that concept play out in

1 interviews that you have conducted?

2 A. Almost every single one.

3 Q. With that training and experience in mind,  
4 did you conclude that the defendant was trying to  
5 minimize his involvement causing the death of a little  
6 baby girl?

7 A. I did.

8 Q. Now, I want to focus lastly, I would like  
9 to focus on the falls that the defendant described  
10 that Yessenia took. I'm going to ask you to review  
11 pages 52 and 39. I'm going to bring this up to you.

12 52 and 39, Counsel.

13 Go ahead and review those two pages, and  
14 look up when you're ready.

15 A. I'm ready.

16 Q. Did the defendant describe Yessenia falling  
17 in the shower?

18 A. Yes.

19 Q. Basically that the shower was slippery?

20 A. Yes.

21 Q. Did he use the word accident anywhere on  
22 those two pages?

23 A. I don't believe I saw that, no.

24 Q. Okay. So if someone pushes someone to the  
25 ground, that's not an accident, is it?

1 A. It is not.

2 Q. If someone falls when they're not pushed to  
3 the ground, is that an accident?

4 A. Could be.

5 Q. It could be a slip.

6 A. Right.

7 Q. A fall, but it was accidental?

8 A. Correct.

9 Q. Unless the child decided, "Hey, I know, I'm  
10 going to throw myself on the ground against the ledge  
11 in the shower."

12 A. Correct.

13 Q. That would be intentional; right?

14 A. That would be.

15 Q. Okay. Was he describing an intentional  
16 falling to the ground?

17 A. Not on her part, no.

18 Q. So specifically as it pertains to page 39,  
19 how many falls was the defendant describing that  
20 Yessenia took?

21 A. So he specifically describes two. However,  
22 the way it's described sounds like more than two. He  
23 describes one fall where she falls and hits what I  
24 would call the threshold of the shower with her rib  
25 cage. And he describes what he calls the second fall;

1 however, he references that she hit from back to back  
2 against the wall on the other side of the door. So  
3 the way it is described, it sounds like what he is  
4 calling a second fall is some sort of reverberating  
5 fall back to back of some sort on the walls of the  
6 shower.

7 Q. So she accidentally, according to him,  
8 slipped and bounced off the wall? Is that what he's  
9 describing?

10 A. After she slipped and hit her ribs on what  
11 I would call the threshold of the shower.

12 Q. Okay. Now, but in context, he's also  
13 describing that she's basically fighting like a cat in  
14 the bathtub and she's flailing all over the place?

15 A. Yes. And his kick during that whole  
16 process. He's describing the kick; a push; the,  
17 quote, going at it, during the time that she's falling  
18 on the threshold and falling against the wall of the  
19 shower.

20 Q. She's trying to get out, and he's having  
21 none of it?

22 A. Correct.

23 Q. And then on page 52, he describes a fall  
24 there. Is that just a further explanation of a fall  
25 that he had described earlier?



1           A.     That's the way I interpreted it. He's  
2 specifically addressing falling on the ground, and he  
3 again references that part that I would call the  
4 threshold of the shower, and that's where he said she  
5 hit her ribs. I believe it was the same conversation  
6 or the same altercation being discussed twice.

7           Q.     And does he go into any further detail  
8 about the incident where back to back, something back  
9 to back?

10          A.     Yes. He describes that her back hit the  
11 back of the shower.

12          Q.     Okay. If you look at page 11, he  
13 specifically says -- and I'm asking you if you recall  
14 this -- quote, There's not one recollection of me even  
15 putting my hands up to her?

16          A.     Yeah. That was in the beginning of the  
17 interview.

18          Q.     Okay. But things change after that?

19          A.     Correct.

20          Q.     But if he never put his hands up to her or  
21 did anything to cause her to fall, then she fell  
22 accidentally; would that be correct?

23          A.     If that were true, yes, that would be  
24 correct.

25          Q.     Now, directing your attention to the



1 exhibits that we marked at the beginning of your  
2 testimony, identifying them by number, why don't you  
3 tell us what each one of them is.

4 A. So State's Proposed Exhibit 19 is labeled  
5 as AC1-69699, and it is a red case with a cell phone  
6 within it. It's an LG cell phone.

7 Q. And how about -- I'm sorry, was that 19?

8 A. That's 19.

9 Q. How about 20.

10 A. Proposed Exhibit 20, which is marked as  
11 AC9-69661, contains two cell phones. One is a ZTE  
12 cell phone, and one is a Samsung. The ZTE is blue and  
13 black, and the Samsung is black.

14 Q. Do you have -- do you have any information  
15 about which phone was the defendant's?

16 A. From my review of the case and my  
17 understanding of it, Proposed State's Exhibit 19, I  
18 believe is the suspect's phone.

19 Q. Okay. The single phone?

20 A. Yes; that's correct.

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

23 THE COURT: Thank you. Do you need a  
24 recess, or are you good to go?

25 MR. MARTINEZ: I'm good to go, Judge.

CROSS-EXAMINATION

BY MR. MARTINEZ:

Q. Good afternoon, Captain?

A. Good afternoon.

Q. So, Captain, I know you just went into detail about the fall in the shower. Cole told you about a fall that happened outside previously; right?

A. Correct.

Q. That Yessenia was climbing on a chair?

A. That's correct.

Q. And she fell off the chair?

A. That is correct.

Q. Cole was smoking a cigarette while that happened; right?

A. I believe he was, yes.

Q. And she fell in the dirt and she got dirty; right?

A. Yes; correct.

Q. That was the reason for the shower in the first place; right?

A. That is what he said, yes.

Q. He also told you that Yessenia didn't like to get her face wet; right?

A. He did say that, yes.

Q. And she especially didn't like cold water;

1 right?

2 A. Or hot.

3 Q. Or hot. Didn't like cold more than she  
4 didn't like hot?

5 A. (No response.)

6 Q. Not important.

7 A. Okay.

8 Q. So if she got water on her face, it would  
9 upset her?

10 A. He did say that, yeah.

11 Q. And she was trying to get out of the  
12 shower; right?

13 A. Correct.

14 Q. Now, you've said that you have done  
15 thousands of suspect interviews; right?

16 A. I was estimating, yeah.

17 Q. Oh, sure. And would you agree that it's  
18 common for suspects to tell you that they don't  
19 remember what happened?

20 A. Yes.

21 Q. This isn't the first time someone's told  
22 you they don't remember what happened?

23 A. No. Very typical.

24 Q. Would you also agree that sometimes people  
25 generally do not remember what happened?

1 A. I don't know if I would characterize my  
2 answer in agreeance to that.

3 Q. So everybody always remembers what happens  
4 all the time?

5 A. No. But I don't believe that often in my  
6 suspect criminal interviews --

7 Q. I just said sometimes.

8 A. I don't even know that I would go  
9 sometimes. Very rarely I would say.

10 Q. Let me ask a different question.

11 A. Okay.

12 Q. In your conversation, do you remember  
13 referring to what you call a critical moment?

14 A. Do I remember?

15 Q. Do you still have your transcript in front  
16 of you?

17 A. I do.

18 Q. Go to page 41 for me. Read through, say,  
19 lines 3 through 14, and look up at me when you're  
20 done.

21 A. (The witness complies.) Go ahead.

22 Q. Do you see where you referenced the term  
23 "critical moment" in there?

24 A. I do see that.

25 Q. And that is you're referring to when

1 somebody suffers some sort of trauma, something bad in  
2 their life; right?

3 A. No. That's not what I was referring to.

4 Q. What were you referring to? Tell me.

5 A. So that's an interview tactic when you  
6 believe somebody is lying to you and they've been  
7 lying to you, to provide them an out where you say,  
8 "Look, there's a time, a critical moment, where you  
9 realize 'Oh, crap, I was in a bad situation, I did  
10 something horrible, and I'm lying about it,'" and you  
11 provide them that out, where you then give them that  
12 chance to come forward with the information.

13 Q. Okay. So the critical moment isn't  
14 actually a moment of trauma that the body does not  
15 remember as a safety mechanism?

16 A. That is what I was referencing, yes.

17 Q. So I'm just trying to make clear, is that  
18 actually a thing, or is that kind of a made-up tactic  
19 for interviews that you use to try and coax a  
20 statement out of a defendant -- out of a suspect?

21 A. So it is an interview tactic to provide  
22 people the ability to, lack of a better term, come  
23 clean for something that they are lying to you about.  
24 And it's based on the fact -- when you say is it a  
25 real thing? Yes. Certainly, there are real instances

1 where people have trauma that affects their memory.  
2 And so it's based on that in that the suspect will  
3 feel comfortable that you're giving them an out that  
4 they can plausibly take to provide information to you.

5 Q. But you do agree there are situations where  
6 people have trauma that affects their memory; right?

7 A. There certainly are, yes.

8 Q. All right. Now, you've been in law  
9 enforcement almost 20 years now?

10 A. Yes, sir.

11 Q. I assume you've taken the stand before  
12 today and testified; right?

13 A. Numerous times.

14 Q. Do you remember every single case you've  
15 ever been on?

16 A. No.

17 Q. Every single time you've ever testified?

18 A. No.

19 Q. When you're testifying on the stand, does  
20 it jog your memory sometimes?

21 A. There are certain events that jog your  
22 memory, yes.

23 Q. When you're testifying about something, do  
24 you sometimes remember details you didn't previously  
25 remember?



1 A. Sure. Of course. Yes, that could happen.

2 Q. Sure. Your memory gets refreshed; right?

3 A. Yes. That has happened.

4 Q. Now, you were not the first person to speak  
5 with Cole from law enforcement; right?

6 A. No. I was not the first.

7 Q. Detective Fernandez interviewed him; right?

8 A. She did.

9 Q. Detective Cox interviewed him?

10 A. I believe he did, yes.

11 Q. Detective Fancher interviewed him?

12 A. I don't have specific recollection of  
13 Fancher.

14 Q. What about Detective Gibbs?

15 A. Detective Gibbs was definitely there, yes.

16 Q. So he had time before he met with you to  
17 talk about what happened; right?

18 A. He did have time, yes.

19 Q. You testified earlier about a moment when  
20 Cole said, "It looks bad."

21 A. Yes. I believe that was --

22 Q. Did he clarify what specifically looks bad?

23 A. I would have to look at the transcript for  
24 sure. I believe it was referencing the injuries on  
25 her body that I showed him.



1 Q. He said he threw her in the shower; right?

2 A. Yes. That was his term.

3 Q. Did you take that to mean a literal pick up  
4 and throw in the shower, or did you take it to mean  
5 more a term of phrase, "I put her in the shower"?

6 A. Based on the nature of the interview that I  
7 was conducting and the other answers that had been  
8 given, I surmised it to be a physical throw in the  
9 shower. Certainly, he referenced it to make it seem  
10 like he just quickly threw her in the shower versus  
11 physically threw her in the shower.

12 Q. You've heard the phrase "I'm going to jump  
13 in the shower" before; right?

14 A. Yes. It's very dangerous.

15 Q. Have you ever seen somebody physically hop  
16 in the shower?

17 A. No.

18 Q. He also said to you that he started going  
19 at it without warning. Was he referring to just  
20 starting the shower without warning and putting her in  
21 the shower?

22 A. Yes. There are two different references I  
23 believe in the transcript to going at it. But yes, he  
24 did reference that he started the shower without  
25 notice. I'm not sure how that happened, but yes,

1 something to the effect of she got thrown in the  
2 shower without having warning to that.

3 Q. Okay. Let's go back to the falls for a  
4 second. The fall outside on the chair. Cole didn't  
5 tell you she fell down and fell unconscious; right?

6 A. No. He said she fell in the dirt and was  
7 screaming, basically.

8 Q. And she got up, and that's when he took her  
9 inside to the shower; right?

10 A. That is what he said, yes.

11 Q. And in the shower when she slipped -- he  
12 said that she slipped; right?

13 A. He did say she slipped all over the place.

14 Q. She hit the ribs on one side; right?

15 A. Yes, on the door.

16 Q. Okay. And then he said she kind of fell  
17 backwards the second time and hit the back of the  
18 shower?

19 A. Correct.

20 Q. He didn't say she fell unconscious then;  
21 right?

22 A. No.

23 Q. He didn't say that when she fell back;  
24 right?

25 A. No.

1 Q. At some point he got her out of the  
2 somehow; right?

3 A. Yes.

4 MR. MARTINEZ: Pass the witness judge.

5 THE COURT: Thank you, sir.

6 Mr. Vitto:

7 MR. VITTO: Just a little bit of redirect.

8 REDIRECT EXAMINATION

9 BY MR. VITTO:

10 Q. Did you have opportunity to feel the back  
11 of Yessenia's head?

12 A. I'd have to look at my report to refresh my  
13 memory. I would venture, based on my experience, I  
14 did. I traditionally check that, but I couldn't tell  
15 you direct recollection.

16 Q. Let me ask you this -- and I may be saying,  
17 I may be pronouncing the word incorrectly; it's not  
18 within my everyday parlance -- crepitus?

19 A. Decrepitus.

20 Q. What is crepitus?

21 A. So you're looking for the skull to be not  
22 in one piece basically. You're checking for  
23 malfigured portions of the skull.

24 Q. Okay. A little grinding?

25 A. Grinding or a lot of times in situations

1 where there's an actual skull fracture, you'll feel  
2 the actual skull give way when you're squeezing the  
3 back of the head gently.

4 Q. Do you remember that with Yessenia?

5 A. No. That's why I said, I mean,  
6 traditionally I would do that examination, but I don't  
7 recall from this instance if I did.

8 Q. Now, in regard to -- specifically in regard  
9 to falling out of the little chair, Yessenia falling  
10 out of the little chair and getting dirty and needing  
11 a shower --

12 A. Yes, sir.

13 Q. -- you recall that, defendant describing  
14 that to you; right?

15 A. Yes, sir.

16 Q. Did he say she accidentally fell out of the  
17 chair? Did he use the word "accidentally"?

18 A. I don't remember. I would have to look at  
19 the transcript.

20 Q. Okay. Well, go ahead.

21 MR. VITTO: Counsel, if you have a page  
22 number, we might be able to save some time.

23 MR. MARTINEZ: Not off the top of my head.

24 MR. VITTO: I know you had asked him, but I  
25 didn't know if you remembered the page.

1 THE WITNESS: I'm ready.

2 Q. (By Mr. Vitto) Okay. Do you remember him  
3 describing Yessenia falling from the chair?

4 A. I do.

5 Q. Did he use the word "accident"?

6 A. He did not.

7 Q. Did he say that he caused her to fall off  
8 the chair?

9 A. No, he did not.

10 Q. So he was describing Yessenia accidentally  
11 falling from the chair?

12 A. Yeah.

13 Q. Without using the word accident; is that  
14 correct?

15 A. It does appear that way, yes.

16 Q. Now, do you recall him telling you that she  
17 wasn't injured as a result from the fall from the  
18 chair?

19 A. Yes. As I refresh my memory, he did state  
20 that.

21 Q. But she was dirty or dusty and she needed a  
22 shower?

23 A. "Dirty" was the word he used.

24 Q. Did he ever use the word "sticky" when  
25 describing how she was that she needed a shower?

1 A. I can refresh my memory if you want.

2 Q. I'm just asking you right now if you recall  
3 that?

4 A. I have a general recollection. I thought  
5 that term was used at some point, but without  
6 refreshing my memory, I wouldn't have direct  
7 reference.

8 Q. That's okay.

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

11 THE COURT: Anything else?

12 MR. MARTINEZ: No, Judge.

13 THE COURT: Thank you. You can step down,  
14 sir.

15 THE WITNESS: Thank you, Your Honor.  
16 Do you want me to leave the evidence?

17 MR. VITTO: Yes.

18 THE WITNESS: Am I excused?

19 THE COURT: Yes, sir.

20 MR. VITTO: Five minutes, five-minute  
21 break?

22 MR. MARTINEZ: Sure.

23 THE COURT: Short recess.

24 MR. VITTO: Thanks, Judge.

25 THE BAILIFF: All rise.



1 (A short recess was taken.)  
2 THE BAILIFF: All rise.  
3 THE COURT: Thank you. Please be seated.  
4 MR. VITTO: Thank you, Your Honor.  
5 THE COURT: Thank you, sir.  
6 MR. VITTO: Your Honor, my last witness  
7 today before closing remarks is to recall Victoria to  
8 the stand.  
9 THE COURT: Thank you, sir.  
10 You're still under oath, young lady.  
11 THE WITNESS: All right.  
12 THE COURT: Thank you. Have a seat.  
13 Whereupon,  
14 VICTORIA SCHLICK,  
15 having been previously sworn, was recalled to the  
16 stand for further examination and testified as  
17 follows:  
18 MR. VITTO: Victoria, you're under oath;  
19 you understand that? Have we did the admonishment  
20 yet?  
21 MR. MARTINEZ: Yes.  
22 THE COURT: I'm sorry. I already told her  
23 she's still under oath.  
24 Keep telling the truth.  
25 MR. VITTO: Thanks, Judge.

DIRECT EXAMINATION

BY MR. VITTO:

Q. Now, Victoria, let me show you State's Proposed Exhibits 19 and 20.

MR. MARTINEZ: Proposed still; correct?

MR. VITTO: Are they Proposed still?

MS. BOSKOVICH: Yeah. They are Proposed.

Q. (By Mr. Vitto) State's Proposed Exhibits 19 and 20. Go ahead and look at those.

A. Uh-huh.

Q. Take your time.

A. Okay.

Q. Look up when you're ready to talk about them. Okay. Identifying them by number -- well, let's just start with 19. Do you recognize 19?

A. Yes.

Q. And what do you recognize 19 to be?

A. Cole's phone.

Q. And in 20, what do you recognize that to be?

A. That's my phone.

Q. Well, there's two phones there. Are they both yours?

A. Oh. And the blue and black one is mine. It's the Samsung. I don't know. The blue and black

1 one is mine.

2 Q. Okay. And what kind of phone is the blue  
3 and black one?

4 A. I believe it was an LG or a ZTE -- ZTE.

5 Q. So your phone is the blue and black ZTE?

6 A. Uh-huh.

7 Q. And that's in 20. And in 19, the  
8 defendant's phone is -- what brand is that; do you  
9 know?

10 A. It's in his case. I don't remember what he  
11 had, but it's in his phone case.

12 Q. All right. I appreciate that.

13 MR. VITTO: Your Honor, I would ask that  
14 State's Proposed Exhibits 19 and 20 be admitted into  
15 evidence.

16 THE COURT: Any objection?

17 MR. MARTINEZ: I have the same relevance  
18 objection that I've had for the past couple of days,  
19 Judge. I know you're going to overrule me.

20 THE COURT: All right. It's preserved.  
21 We'll admit it for this hearing only.

22 MR. MARTINEZ: Thanks, Judge.

23 MR. VITTO: The description of the evidence  
24 of 19 says one LG cell phone.

25 / / /

1 (Whereupon State's Exhibits Nos. 19  
2 and 20 are admitted into evidence.)

3 Q. (By Mr. Vitto) Victoria, let me ask you:  
4 Prior to the day that Yessenia died, when had you last  
5 given her a bath or a shower?

6 A. The day before.

7 Q. Okay. So the day before she died, you gave  
8 her a bath or a shower. Was it a bath or a shower?

9 A. I believe it was a bath. She likes to take  
10 baths with the toys and stuff.

11 Q. Okay. The day before she died, did you see  
12 any injury on her body?

13 A. No.

14 Q. Now, during cross-examination, the Defense  
15 asked you questions about your conversation with  
16 Kishanna --

17 A. Uh-huh.

18 Q. -- after Yessenia had died; do you remember  
19 that?

20 A. Yes.

21 Q. And do you remember characterizing the  
22 conversation with Kishanna as basically an  
23 "I told you so" kind of conversation?

24 A. Yes.

25 Q. That being the case, let me ask you this:

1 In December of 2016, when you took Yessenia to the  
2 doctor, after what Kishanna had told you about what  
3 she saw with the defendant and Yessenia, did you love  
4 the defendant?

5 A. Yes.

6 Q. Did you believe that he could hurt  
7 Yessenia?

8 A. No.

9 Q. Do you remember the pictures with the  
10 injury to Yessenia's chin that we talked about  
11 yesterday; right?

12 A. Yes.

13 Q. And as a result of that injury, you took  
14 Yessenia to UMC; is that correct?

15 A. Yes.

16 Q. And at that time, and that was in April of  
17 2017, did you love the defendant?

18 A. Yes.

19 Q. Did you think he could or would hurt  
20 Yessenia?

21 A. No.

22 Q. You're familiar with the picture in May  
23 where Yessenia is obviously upset and it looks like  
24 she might be kicking?

25 A. Uh-huh.

1 Q. Do you know the picture I'm talking about?

2 A. Yes.

3 Q. That was in May. You identified that as  
4 being in May of 2017. At that time did you love the  
5 defendant?

6 A. Yes.

7 Q. Did you think he could or would hurt  
8 Yessenia?

9 A. No.

10 MR. VITTO: I have no more questions of  
11 this witness at this time, Judge.

12 MR. MARTINEZ: No cross, Judge.

13 THE COURT: Thank you. You can step down.

14 MR. VITTO: Judge, that's my State's case  
15 in chief for Petrocelli argument.

16 THE COURT: I know the answer is probably  
17 no, but any case in chief?

18 MR. MARTINEZ: No, Judge. We're ready for  
19 closing.

20 THE COURT: Thank you. All right. Ready  
21 for close.

22 MR. VITTO: Okay. Here we go.

23 Judge, we have some people in the gallery,  
24 one of whom is a witness. I don't believe there can  
25 be a notable objection to a witness being present



1 during summation so. If there is no objection, I will  
2 begin.

3 Your Honor, it's the position of the State  
4 that this evidence is relevant. It's the position of  
5 the State that this evidence is clear and convincing.  
6 It's the position of the State that the danger of  
7 unfair prejudice is obviated by the giving of a jury  
8 instruction that will ensure that the probative value  
9 will not be substantially outweighed, which is the  
10 standard, by any danger of unfair prejudice, which is  
11 the standard. Because everything about the State's  
12 case is designed on purpose to be prejudicial.

13 The defendant in his conversation, his  
14 interview with Captain Boruchowitz described some  
15 accidental falls. There's no traction to be gained by  
16 any fact that the defendant didn't precede his  
17 comments by saying, "And she fell accidentally."  
18 Clearly what he was describing were accidental falls  
19 from the chair and in the shower.

20 He also made reference to his alcohol  
21 consumption, wouldn't have gotten so angry if he  
22 wasn't drunk. This must have been because he was  
23 drunk, especially after being shown the pictures. "I  
24 could never do something like that if I wasn't drunk."  
25 So he presents his intoxication as some kind of "This

1 had to be a mistake or an accident. It's certainly  
2 not anything that I would intentionally do or do on  
3 purpose." That's his position. And we know that's  
4 his position.

5 The Defense presents the defendant's  
6 position in their Opposition brief on page 2 of their  
7 nine-page brief. Cole Engelson is accused of  
8 murdering his girlfriend's three-year-old daughter  
9 Yessenia Camp by abusing her so badly she suffered  
10 fatal injury. Engelson does not know what happened to  
11 the little girl the night she died because he was too  
12 intoxicated; that's the defense. "I don't know what  
13 happened. I was too intoxicated." He suspects she  
14 may have incurred the injuries by falling while he  
15 gave her a shower before bed. Their defense is that  
16 this was an accident or a mistake.

17 You look at the injuries to this little  
18 girl. This was no mistake. This was no accident.  
19 Circular bruising on different parts of her body.  
20 This little girl was beat from stem to stern, from top  
21 to bottom.

22 And the events between December 2016 and  
23 July 15, 2017, the day of Yessenia's death, reflect  
24 the fact that this was no accident, that it was no  
25 kind of mistake. Child Abuse is a general intent

1 crime. Child Abuse Causing Death is First Degree  
2 Murder.

3 NRS 48.0452 says that "Evidence of other  
4 crimes, wrongs, or acts is not admissible to prove the  
5 character of a person in order to show that he acted  
6 in conformity therewith. It may, however, be  
7 admissible for other purposes such as proof of motive,  
8 opportunity, intent, preparation, plan, knowledge,  
9 identity, or absence of mistake or accident. And at  
10 the close of my first closing, we'll be talking about  
11 other purposes.

12 I referenced Ledbetter, and I'm arguing  
13 this analogously. I want to make that very clear what  
14 I'm saying and what I'm not saying. I'm arguing this  
15 analogously. From Ledbetter on page 7 of my brief,  
16 "The probative value of explaining to the jury what  
17 motivated Ledbetter, an adult man, who was in a  
18 position to care for and protect his young  
19 stepdaughter from harm, to instead" -- and I will just  
20 say without reading the full quote -- "to instead  
21 abuse the victim over so many years was very high."

22 Well, this is a relationship that didn't go  
23 on for years. This is a relationship that didn't even  
24 go on for a year. It started in September, and as  
25 this Court has heard over the last two days, there are

1 incidents -- there's an incident in December, there's  
2 an incident in April, and we have the picture from  
3 May. And then Yessenia is dead on July 15th of 2017.

4 As far as motivation, Kishanna made it very  
5 clear, he can't handle this little girl. He doesn't  
6 know how. He's frustrated by this little girl. He  
7 doesn't have the skill to do what's necessary with  
8 this little girl. So what motivates him, an adult  
9 man, in a position to care for and protect and to  
10 protect Yessenia, and then otherwise to abuse or harm  
11 her, according to the Court in Ledbetter is very high.  
12 The probative value is very high. The kind of  
13 prejudice that the defendant should be protected from  
14 is, as I've stated, unfair prejudice.

15 The Court in Ledbetter talked about the  
16 problem being deficient limiting instructions.  
17 Deficient limiting instructions are a factor this  
18 Court has considered when analyzing the admissibility  
19 of prior act testimony. We're not going to have that  
20 problem. We're not going to have deficient jury  
21 instructions. Our jury instructions, should the Court  
22 decide to admit any of this evidence, will be  
23 sufficient.

24 As I pointed out on page 8 of my brief,  
25 this Court can rule the bad act evidence admissible

1 without fear that it will be unfairly prejudicial  
2 because of the jury instructions, and because of the  
3 fact that the jury does not have to hear everything or  
4 nothing; they can be allowed to hear enough without  
5 hearing too much. The fact that a defendant's case  
6 will be harmed by the admission of certain evidence  
7 does not constitute unfair prejudice.

8 As we're all aware, bad act evidence can be  
9 unfair when it would appeal to, quote, the emotional  
10 and sympathetic tendencies of a jury, rather than the  
11 jury's intellectual ability to evaluate evidence.  
12 That's where the jury instructions come in, and we all  
13 know the jurors are presumed to follow the  
14 instructions they are given. Just because evidence is  
15 emotional is no basis to exclude it. To be excluded,  
16 the evidence must, quote -- must tend to, quote, lure  
17 the fact finder into declaring guilt on a ground  
18 different from proof specific to the offense charged.

19 The plain language of NRS 48.035 implies a  
20 favoritism toward admissibility, and that's the new  
21 statute. The prejudicial impact must substantially  
22 outweigh the probative value. And this is a quote  
23 from Holmes v. State on page 11 that "All evidence  
24 offered by the prosecutor is prejudicial to the  
25 defendant. There would be no point in offering it if



1 it were not. The real question is whether the  
2 probative value was substantially outweighed by the  
3 danger of unfair prejudice," as I've been expressing.  
4 "The substantially outweighed requirement requires a  
5 favoritism toward admissibility. Evidence is unfairly  
6 prejudicial if it encourages the jury to convict the  
7 defendant on an improper basis." And no one -- if  
8 this Court were to allow this evidence, no one will  
9 tell the jury more often or more pointedly than me how  
10 they should use it and how they can't.

11 So what the State will be asking for, what  
12 I am asking for is that to the extent that they  
13 wouldn't be admissible as res gestae, being recovered  
14 from his phone as part of a murder investigation, to  
15 the extent they are inadmissible as res gestae, the  
16 State would be asking that those photographs be  
17 admitted; that's one. We know that the photos taken  
18 by Josh Teter are going to be admitted, or we assume  
19 or presume they will be. We're asking for the photos  
20 from the phone. We're asking that Kishanna Marquez be  
21 able to testify, as she has done at this hearing; that  
22 Dr. John Lepore be allowed to testify, as he has done  
23 at this hearing; and that the UMC Quick Care medical  
24 records be admitted into evidence.

25 On December 29th, 2016, Yessenia was taken



1 to see Dr. Lepore. He acknowledges that little kids  
2 get bruises on their legs. He also pointed out that  
3 this was, quote-unquote, more than the norm to the  
4 point that it alarmed him. He began to ask further  
5 questions. More than the norm, the ankles and lower  
6 legs. Victoria did immediately see some redness in  
7 the area, no blood, but Victoria took Yessenia to  
8 Kidfixers because it was causing Yessenia pain and  
9 discomfort.

10 Kishanna testified that the defendant was  
11 dragging Yessenia by the arm through the rocks and up  
12 the stairs while she was screaming. Kishanna never  
13 had a similar problem with Yessenia. She was very  
14 clear, and she told -- she testified that she told  
15 Victoria, "He can't handle her. He's frustrated with  
16 her." She testified that the memory of what she  
17 observed was burned into her mind.

18 The evidence before the Court reflects that  
19 this incident occurred about a week before Christmas  
20 2016. Importantly, whether she was even injured by  
21 that incident is less important than the fact that it  
22 reflects the defendant's callousness and disregard for  
23 the health and safety of this baby. The point is that  
24 he couldn't handle her. The point is the fact that he  
25 was frustrated with a baby. It's about the disregard

1 for her life and the way he treated her. Kishanna saw  
2 it, and she told Victoria, "I told you so."

3 As I argue for admissibility in regard to  
4 accident and mistake, this evidence is about the fact  
5 that what is obvious, based on his interviews which  
6 this court has seen and read, is that he can't or  
7 won't accept the truth along the lines of what  
8 Captain Boruchowitz testified to and his minimizing  
9 his involvement with what he adopted as being his own  
10 and sole responsibility. At one point he finally had  
11 to reach that conclusion. Nobody else was home.

12 He clearly can't come to grips with the  
13 fact that he killed the baby. So he says I don't  
14 remember. He says she accidentally fell in the  
15 slippery shower. He says that he was drunk; that  
16 someone would presuppose that his intoxication excuses  
17 what the evidence is screaming. He says throughout  
18 his interviews -- they're in evidence -- that he  
19 doesn't remember with the same breath that he explains  
20 what happened and what he did in detail. She  
21 accidentally fell. She accidentally fell. She's  
22 trying to get out of the shower. I kicked her back  
23 into the shower. I don't remember what happened, but  
24 I had to push her back in the shower, (inaudible) by  
25 her head. He does remember, but he offers his

1 minimizing recollection. She fell and bumped this  
2 ledge. She fell on her back. She's in a slippery  
3 shower like a cat thrown in a bathtub flopping all  
4 over the place. She doesn't like to get her face wet.  
5 It was an accident.

6 Judge, you look at the photographs that  
7 have been admitted into evidence. This was no  
8 accident. This was a homicide. The evidence clearly  
9 militates contrary to this being an accident. He  
10 can't handle her. He gets frustrated. And during  
11 that frustration, he beat Yessenia to death. He dealt  
12 the death blow. This was no accident. Properly  
13 admitted, with the proper limiting instruction, it is  
14 not unfairly prejudicial.

15 DeFonseka recovered ten photographs from  
16 the defendant's phone that show a bruised, injured  
17 child. We've got a photo from February 2017. We've  
18 got the chin incident April 2017. We've got the other  
19 photograph, May 30, 2017, where she's obviously upset.  
20 She frankly looks terrified, and Yessenia's dead in  
21 less than two months from then.

22 Victoria said that Yessenia cried to her,  
23 "Mommy, please take me with you. I don't want to be  
24 left alone with Cole." And we're going to come back  
25 to that.

1 In regard to the chin picture the day she  
2 died and the chin picture from the previous April,  
3 both occasions the defendant was alone with Yessenia.  
4 Both occasions, the defendant was drinking. Both  
5 occasions, the defendant was giving her a shower.  
6 Both occasions, the defendant said he placed her on  
7 the counter. And on both occasions, it happened  
8 during the middle of the day.

9 Contrary to this being an accident or  
10 mistake, what we see manifest is a callous, reckless  
11 disregard for human life for this child Yessenia, her  
12 well-being, her health, and her life. And just as the  
13 general intent crime of child abuse can be a basis for  
14 First Degree Murder, a callous disregard for human  
15 life can be Second Degree Murder.

16 Clearly, to be admissible, the evidence  
17 must legally fit within the rubric of the applicable  
18 statute, permissible bad act purpose. Because if it  
19 doesn't, it's inadmissible. However, if it does, it  
20 should be admitted, because we can obviate the danger  
21 of unfair prejudice.

22 Is this something that is to one degree or  
23 another inexplicable? Does it help the jury? That's  
24 a definition of relevance. Does it help a jury  
25 understand how, why? He can't handle her, frustrated.

1 Does it help a jury understand how the  
2 incomprehensible, how a 350 pound man could beat a  
3 little three-year-old girl to death? Does it help a  
4 jury come to grips with that? And that's the  
5 Ledbetter language. It helps a jury rightly  
6 apprehend -- I won't say comprehend; let's say  
7 apprehend -- it helps the jury apprehend the  
8 incomprehensible.

9 I'm asking for the admission of the photos  
10 from his phone, the testimony of Kishanna, Kidfixers,  
11 UMC Quick Care. The two stories for which are  
12 virtually identical. You want to know why she ran  
13 screaming after her mom when Victoria left her with  
14 him? You want to know why she looked so terrified in  
15 the picture from May? This was no drunken mistake,  
16 and this was no accident.

17 And in the Defense brief, as I outlined  
18 earlier, "I don't know. Got drunk. I don't know."  
19 He doesn't know, but he pulled her head back, he threw  
20 her in the shower, he kicked her back in the shower.  
21 She fought like a cat thrown in the tub to get out of  
22 the shower. They were going at it, and she was  
23 screaming the whole time. And if you look at the  
24 transcript, as opposed to curling up in a ball in the  
25 corner like she had done in the past, she reacted



1 differently this time.

2           For that purpose and for those reasons, it  
3 is relevant, it is clear and convincing, and with the  
4 provision of appropriate jury instructions, the  
5 probative value is not substantially outweighed by the  
6 danger of unfair prejudice, which is the concern that  
7 the jury would convict the defendant for the bad acts  
8 as opposed to the Murder with which he is charged.

9           And lastly, Judge, the last thing that  
10 Victoria ever heard her little three-year-old girl say  
11 was, "Mommy, please don't leave me alone with Cole."  
12 Don't you think she's tortured by that memory?  
13 "Mommy, please don't leave me alone with Cole." Other  
14 purposes, Judge. These bad acts explain why Yessenia  
15 didn't want to be alone with the defendant. It's not  
16 a happy time. This evidence is relevant. It's clear  
17 and convincing. And the probative value is not  
18 substantially outweighed by dangers of unfair  
19 prejudice, especially with the giving of a jury  
20 instruction which jurors are presumed to adhere to.

21           Your Honor, I'm asking that this Court  
22 allow, with the proper limiting instruction, the jury  
23 to hear the evidence that the State has presented.  
24 And I'm not talking about the transcripts and all of  
25 that other stuff to give a basis for what it is that I



1 was claiming, but specifically those items that I've  
2 mentioned, Judge. Thank you very much.

3 THE COURT: Thank you.

4 Counsel?

5 MR. MARTINEZ: Thank you, Judge.

6 For each one of these, the State must prove  
7 the act first by clear and convincing evidence. As I  
8 will show the Court, there is a disagreement and the  
9 State has certainly omitted certain facts and  
10 testimony that we have heard over the past couple of  
11 days regarding some of these instances, Judge.

12 If they can't present that clear and  
13 convincing evidence, each one of these items the State  
14 wants to introduce must somehow be relevant. That  
15 means it must make the existence of some fact more or  
16 less likely (inaudible). And again, I'm going to go  
17 through them one at a time and hit all of these and  
18 how they are not relevant. And the probative value  
19 must outweigh the danger of unfair prejudice to the  
20 defendant.

21 And of course the State is right. Every  
22 piece of evidence the State presents at trial will  
23 have prejudicial value to the defendant. That's how  
24 they prove their case. But if there is no probative  
25 value, as there is with a lot of these items, then

1 that necessitates that the prejudice is unfair to the  
2 defendant, because there is no probative value because  
3 some of these items are just flat out not relevant.

4 I will start with the most easy -- with the  
5 easiest one, Judge. Dr. Lepore and the Kidfixers'  
6 records. The clear and convincing evidence that we  
7 have there is that Yessenia went to the Kidfixers,  
8 Dr. Lepore, when Victoria noticed the marks, the  
9 bruising that were on her ankles. Victoria took her  
10 there the same day.

11 Dr. Lepore noted the bruises. Perhaps they  
12 seemed like they could be a little bit more than what  
13 kids typically will get on their shins or bruises kids  
14 will typically have. Asked questions of Victoria to  
15 see what was going on, to see if there was possibly  
16 any abuse. Dr. Lepore, who is a mandatory reporter,  
17 is satisfied enough with Victoria's questions to say,  
18 "Nothing to be concerned about here. If she shows up  
19 again with bruises like this, I will probably have to  
20 report next time."

21 Victoria testified no big concern from her  
22 either. More importantly, Victoria testified she  
23 didn't notice these bruises on Yessenia at all until  
24 Yessenia spent time at her father's house for  
25 visitation. She was over at Yancey's house, she

1 returned back to Victoria's custody, noticed --  
2 Victoria noticed the bruises on her leg, and  
3 immediately took her to the doctor. She testified  
4 Cole didn't hang out with Yancey. Cole Engelson was  
5 not over there. If that's the case, Cole Engelson had  
6 absolutely nothing to do with those bruises on her  
7 legs. They have zero probative value in this case at  
8 all. The State is trying to connect them with the  
9 incident with Kishanna where she saw Cole dragging her  
10 through the rocks.

11           Importantly, something that Kishanna  
12 testified to was when Cole grabbed her by the arms and  
13 dragged her along the rocks, only her feet were  
14 touching the ground. Not her shins, not her ankles,  
15 not her knees, not the rest of her body. Those  
16 injuries did not occur being dragged through the  
17 rocks. They occurred somehow while she was with her  
18 father. Don't have to make any allegations against  
19 Yancey. There's no allegations of abuse there.  
20 Perhaps they were a little bit more than what normally  
21 happens with a child. Cole had nothing to do with  
22 those bruises.

23           Because of that, everything relating to  
24 Dr. Lepore and the Kidfixers' records are completely  
25 and utterly irrelevant to the charge at hand and must

1 be left out. They can show no other purpose, because  
2 Cole wasn't present for them.

3 The pictures from Cole's phone, Judge.  
4 There's the two that show the injuries to her chin,  
5 and I will cover those later. The rest of the  
6 pictures show a clearly upset Yessenia. When Victoria  
7 was on the stand, she was shown the first picture that  
8 was taken in May. Her response, her description  
9 before being asked any additional questions was, "Yes.  
10 I recognize that. That's a picture of Yessenia  
11 throwing a fit." The same picture, the same type of  
12 pictures she had received multiple times, which is  
13 what all of the other pictures show, Yessenia throwing  
14 a fit, throwing a tantrum, just as any other two- or  
15 three-year-old would do. They throw tantrums.  
16 They're called the terrible two's. Most people I  
17 speak to say the three's are worse. Their kids throw  
18 tantrums. They don't listen when they get their way.  
19 That's what she was doing in those pictures.

20 And as he's done before when he babysat  
21 Yessenia when she was throwing a tantrum, when she  
22 wasn't behaving herself, Cole took a picture and said,  
23 "I'm going to tell your mom," and sent the picture to  
24 Victoria and said, "Yessenia is not behaving. Here's  
25 a picture of her not behaving and throwing a tantrum."

1 That doesn't show any sort of abuse. The State is  
2 reading into this that it says, "It shows that  
3 Yessenia was afraid of Cole and didn't want to be left  
4 alone with him." We have no testimony to that at all,  
5 Judge.

6 Beyond that, these pictures themselves,  
7 they're not an act at all. We don't have any sort of  
8 evidence that they are the result of any sort of abuse  
9 or anything along those lines, any sort of reported  
10 act to be entered into evidence. I'm sure the State,  
11 when the Court agrees with me and denies that they be  
12 entered into evidence as prior bad acts, the State may  
13 try and bring them into evidence at trial and we'll  
14 object for different reasons at that time.

15 The State tries to argue, we know that she  
16 was terrified of Cole there because on the night that  
17 she died, she ran out of the house after Victoria and  
18 said, "No, don't leave me here with Cole. Take me  
19 with you." We heard testimony from Victoria, "Not the  
20 first time that she's done that. Cole's not the only  
21 person that she's done that with." Again, she's a  
22 three-year-old child. They have their tantrums. They  
23 have their moments. They don't want to be left alone.  
24 They don't want to go to a certain place. There's  
25 things that they do or do not want to do, and they



1 have a tantrum and they get upset and there's nothing  
2 that you can do about it.

3           There's no probative value in those  
4 pictures, Judge. They're presented for no other  
5 purpose than for the State to try and say, "Reach into  
6 your emotions, Jury. See how upset she was. That's  
7 how we know that she didn't like being left with the  
8 defendant." There's no facts to back that up, nothing  
9 at all. It's an argument that the State wants to  
10 make.

11           They're not relevant, they're not  
12 probative, and they'll be nothing but unfairly  
13 prejudicial because, again, we're asking the jury to  
14 say, "Look at how bad, look at these pictures. This  
15 shows you how bad of a person the defendant is, and  
16 you need to convict him."

17           Judge, the pictures that Deputy Teter took,  
18 as we've kind of conceded, they're likely to be  
19 admitted for other purposes as part of the case in  
20 chief anyway. As they relate to this case though,  
21 Judge, essentially we spent all day today litigating  
22 the Murder trial. The State pointed out that we did  
23 put it in our brief that the defense decided that  
24 Yessenia died as a result of an accident. Fine. We  
25 didn't need to litigate the Murder trial today in



1 order for the State to present that as the reason why  
2 they're trying to go bring these acts in as absence of  
3 mistake or accident. They charged Cole with Murder;  
4 so we know that they do not believe that this was  
5 an -- that this was not an accident. They know that  
6 they believe that he intentionally killed her;  
7 otherwise, he wouldn't be charged with Murder. It's  
8 about as simple as that, Judge.

9           The incident with Kishanna. The testimony  
10 that we heard to get to the clear and convincing  
11 evidence is that Kishanna came home. She opened all  
12 of the windows because it was a nice day out. Cole  
13 had taken Yessenia to the park. Kishanna heard  
14 Yessenia screaming from inside and looked out the  
15 window and saw Cole dragging her along the rocks. He  
16 had grabbed her by one arm. Only her feet were  
17 touching the rocks. She went outside, and when she  
18 did, Cole was bringing her up the steps. And by that  
19 point, he lifted her off the ground. Again, this  
20 resulted in no injuries to Yessenia at all. Kishanna  
21 said she took her from Cole, she checked her out, she  
22 calmed her down. She noticed no injuries, no scrapes,  
23 no redness, no bruises, no bleeding, nothing.

24           The State argued motive and cited to the  
25 Ledbetter case as a reason why the incident with

1 Kishanna should be introduced into evidence.  
2 Ledbetter specifically says, "The court went on to  
3 warn that other courts should not apply Ledbetter's  
4 reasoning in any other circumstances outside of sexual  
5 abuse cases." That's what the State is doing though.  
6 This is not a sexual abuse case, Judge. That case,  
7 the Ledbetter case was specific on point to a single  
8 type of case, not all cases where a child is involved,  
9 not all cases where you want to bring motive in.  
10 That's what the State is trying to do. The State is  
11 use using this as a propensity argument, Judge, that  
12 he had a propensity to get frustrated when he spent  
13 time with Yessenia, and he got frustrated on the night  
14 she died and that's why he committed this. That's it.  
15 It goes to his character.

16 Again, the State argues that this is  
17 another example of her being terrified, not wanting to  
18 be with Cole, not listening to him, and all of those  
19 things. The testimony we heard from Victoria was that  
20 Yessenia was Cole's favorite. And Yessenia loved him  
21 too. She followed him around. Victoria called  
22 Yessenia "Cole's little minion." They were so close  
23 that Yessenia started picking up some of his  
24 mannerisms, Judge. This was not a child that was  
25 afraid of Cole. This was a two-year-old that threw

1 tantrums. That's what's shown in the picture. That's  
2 what likely happened on the day when the rocks were  
3 thrown. She was throwing a tantrum because she was  
4 throwing rocks, Cole told her not to, and said,  
5 "That's it. We're going inside," grabbed her by the  
6 arm to bring her inside.

7           And anybody who has had kids, has been  
8 around kids in a situation like that where a two- or  
9 three-year-old does not do -- does or does not want to  
10 do something that you're telling them to, they will  
11 throw a tantrum. I have seen many a kid in my day,  
12 Judge, and I'm not that old, be grabbed by a single  
13 arm and told, "Let's go. We're leaving." It does not  
14 mean that that is child abuse. And it's not offered  
15 for anything to prove anything other than his  
16 propensity to do that here, Judge, to say that this is  
17 the way that he disciplines kids and it needs to be  
18 regarded for that purpose. It's inadmissible  
19 character evidence.

20           Lastly, Judge, I want to talk about the  
21 UMC Quick Care records and the two photos with the  
22 injuries to Yessenia's chin that were found on Cole's  
23 phone. In the State's own words, they talked about  
24 what happened with that incident and then said, "Just  
25 like this case. It happened there, just like this

1 case. It happened there, just like this case."  
2 They're saying it happened once so it had to happen  
3 again. They're making the argument for propensity and  
4 calling it something different. They're making the  
5 argument of character evidence and calling it  
6 something different. Judge, if it has feathers, web  
7 feet, and it quacks, it's a duck. The State can call  
8 this whatever it wants. It's inadmissible evidence of  
9 his propensity to do the same thing.

10 Beyond that, the clear and convincing  
11 evidence that we saw over the past two days, Judge,  
12 was that this absolutely was an accident. Victoria  
13 testified she received a text message from Cole  
14 saying, "Yessenia fell off the counter. Look what  
15 happened. She cut her chin." Victoria immediately  
16 went home, grabbed Yessenia, went to Quick Care.  
17 Yessenia, the words out of her mouth, "I fell." Not  
18 Cole hit me. Not that Big Cole pushed me. I fell.  
19 It was an accident.

20 But this is where I've been getting at with  
21 the circular logic, Judge. The State has presented  
22 all of the evidence today about what happened on the  
23 night Yessenia died to say that was not an accident.  
24 And then they're using their hindsight, their 20/20  
25 glasses to say, "Well, hey, since that wasn't an

1 accident, it clearly shows that other time when she  
2 hurt her chin, that must not have been an accident as  
3 well. So now since we've used the later incident to  
4 prove that the earlier incident was not an accident,  
5 we want to turn around at the trial and prove that the  
6 earlier incident proves that the later incident wasn't  
7 an accident.

8           The incident with her chin, Judge, is  
9 nothing but propensity. It's inadmissible character  
10 evidence. It can't present for any other purpose.  
11 All of that is to show another picture with an injury  
12 to Yessenia to put in front of the jury to say, "Look  
13 at this little girl and her injury. Look how terrible  
14 of a person Cole Engelson is. That's why you should  
15 convict him, not for all these other reasons." I know  
16 the State believes that they have mountains of  
17 evidence and it's a slam dunk case against  
18 Mr. Engelson with or without this. Let them use  
19 everything else then, if that's what they have. Don't  
20 let inadmissible come in and take the risk that it  
21 will be caught up in appeals for the next few years  
22 and have to do this trial a second time.

23           The State says think about Victoria, the  
24 last things that are burnt into her mind, that she  
25 believes that she deserves justice. I can't think of



1 anything worse than believing that you have closure  
2 only to have to come back and do the trial a second  
3 time because the Judge may have been overturned on  
4 appeal when there clearly, clearly no reason other  
5 than propensity evidence here and inadmissible  
6 character evidence.

7 For that reason, Judge, I'm asking you to  
8 deny the State's motion, the State's request to admit  
9 all of these prior acts into evidence. Thank you.

10 THE COURT: Thank you, sir.

11 Mr. Vitto?

12 MR. VITTO: Yes, Your Honor. I made a few  
13 notes. Chicken scratch.

14 There is no slam dunk case. There's no  
15 easy case. I have never seen that animal. I'm going  
16 to fight for my case, and I'm going to present my case  
17 to the very best of my ability. And I will follow  
18 unquestionably every ruling of this Court when this  
19 Court ultimately rules and decides the matter.

20 And if the defendant were to be convicted  
21 and if this Court had allowed bad act evidence in and  
22 if allowing bad act evidence in was an abuse of  
23 discretion, you'll be reversed. But if it isn't an  
24 abuse of discretion, if it's clearly articulated, if  
25 there is a basis for the admission, if the defendant



1 is convicted, this Court won't be reversed.

2 What we know is that Yessenia was beaten to  
3 death. And we know based on the Defense Opposition  
4 that the defense will be that this was an accident  
5 somehow, because he doesn't know, or a drunken  
6 mistake. Judge, I'm asking you to look at what the  
7 State has presented globally and in context.

8 For while Victoria didn't do anything else  
9 other than what she did in regard to the Kidfixers  
10 incident or the UMC incident, there was a time in the  
11 history of the world when Victoria loved him. She  
12 couldn't conceive that he would or could hurt her baby  
13 girl. Is this evidence relevant as the Defense put it  
14 out, as the Defense pointed out? Is it relevant?  
15 Does it make any fact of consequence more or less  
16 likely? Well, will it aid a finder of fact in  
17 determining whether what happened to Yessenia was an  
18 accident? Will it aid the trier of fact when  
19 determining whether this was some kind of mistake?  
20 Will it aid the trier of fact when deciding or  
21 considering or deliberating why Yessenia would say,  
22 "Mommy, please don't leave me alone with Cole"?

23 In regard to Ledbetter, I clearly expressed  
24 that I was arguing other purposes analogously to that  
25 case, certainly not claiming the fact pattern of that

1 case was applicable to the fact pattern that is before  
2 the Court.

3 In regard to Kidfixers and Kishanna,  
4 Kishanna also importantly testified that the defendant  
5 was dragging her up the stairs. And it's rank  
6 speculation to try to say -- because there's zero  
7 evidence that any bruises happened as a result of  
8 Yessenia's father; there's nothing to support that.  
9 It's also common knowledge that bruises change over  
10 time. According to Kishanna and Victoria, only a week  
11 had passed. They put the date at December 22, a week  
12 prior to the visit to Kidfixers. Bruises change.

13 Victoria testified that it wasn't her norm.  
14 She's a very sociable little girl. It wasn't her norm  
15 to complain about being left.

16 In the Defense Opposition brief, they go to  
17 some length to decry the admission of the bad act  
18 evidence because they aren't similar enough. So I  
19 present a fact pattern that is virtually identical,  
20 and I'm chided for that because now I'm using it for  
21 an improper purpose. "Well, they aren't similar  
22 enough, Judge. Well, now they're too similar."

23 The chin incident manifests the point I'm  
24 trying to make, which is the callous disregard at best  
25 for this little girl manifest by the defendant when

1 this little girl is in his care. When he kicked her  
2 back into the shower, did he say, "I'm going to kill  
3 you"? There's no evidence of that. When he pushed  
4 her back into the shower by her head, did he say, "I'm  
5 going to kill you"? No evidence of that. But it's a  
6 clear callous disregard for the life of a little baby  
7 girl.

8           The Defense points out, "Oh, Yessenia said  
9 she fell, so that must be what happened," from a  
10 little two-year-old girl. Believe her, Judge. No,  
11 she was two at the time. Nope. You're right; I'm  
12 corrected. She was three. Her birthday was in  
13 January; the chin incident happened in April. Thank  
14 you, Counsel. So she was a little three-year-old  
15 girl; so her falling off the counter and hurting her  
16 chin was an accident, just like the accident the  
17 defendant will claim happened that resulted in the  
18 death of Yessenia.

19           And Defense says, "Yeah. The picture just  
20 shows that she was having a fit, throwing a tantrum."  
21 Well, why? For fun? Who takes pictures like that and  
22 keeps pictures like that on their phone? The  
23 defendant.

24           The reason we're here, Judge, is because  
25 based on the evidence there's an argument, and I'm

1 making it, that this evidence is admissible.  
2 Ultimately, you will rule, and we will abide by your  
3 ruling. But because I've never seen the slam-dunk  
4 animal or an easy-case animal, we're presenting this  
5 argument. It's supported by the evidence. It meets  
6 the statute, and even if it's appropriate to bring and  
7 even if it fits the statute, you alone are vested with  
8 the authority to make that call and to weigh the  
9 probative prejudicial balance and make a decision.

10 Thank you very much, Your Honor.

11 THE COURT: Thank you. Anything else?

12 All right. Let's take a short recess, five  
13 or ten minutes.

14 THE BAILIFF: All rise.

15 THE COURT: I'm going to need those  
16 pictures.

17 (A short recess is taken.)

18 THE BAILIFF: All rise.

19 THE COURT: Thank you. Please be seated.  
20 All right. Let's wait for Cole, and then we'll get  
21 started. All right. The joke at judicial college --  
22 and I think I've told you all this before -- when you  
23 go up to judicial college the first time, which I did  
24 about 20 years ago, and they'll say the attorneys  
25 prepare their case for a few months and talk to their

1 experts and get all the evidence and come in all  
2 organized. They come in and present it to you for  
3 hours. You take five minutes and decide what the  
4 right answer is, and then we'll take it up on appeal  
5 and let nine of the top judges in the nation decide  
6 whether you made the right decision with their law  
7 clerks and so forth. And it's a humorous scenario  
8 they put judges in because they're hard decisions and  
9 I have to make them fast.

10 And in this case, actually I found a couple  
11 of them to be a little easy after I did my analysis on  
12 them. And they are as follows: Lepore is not going  
13 to be admitted as a prior bad act. I have not found  
14 clear and convincing evidence of those bruises, where  
15 they came from, how they happened. Was it at dad's  
16 house? Was it at her house? The week before?  
17 Playing on the playground? Did she get in a kicking  
18 fight with her brother? Did the defendant do it when  
19 he was beating her one night? I just don't know. And  
20 because I don't know, it's not clear and convincing to  
21 me. So I'm not going to allow the Lepore speculation  
22 on the bruises.

23 On the Marquez matter, I am not going to  
24 allow it, because the testimony was that he took the  
25 child by the arm back to the house and up the stairs



1 when Marquez came in and got involved. Marquez looked  
2 and didn't see anything wrong. Mom looked and didn't  
3 see anything wrong. I asked was he dragging the child  
4 on the rocks. Was he jerking her arm and lifting her  
5 up in the air? Did he pop her on the back of the  
6 head? Did anything occur? And there was nothing.

7               So this was a situation where he was taking  
8 her in the house, perhaps roughly, which is what the  
9 State's basically trying to show. And I drew a little  
10 scale in my head of the super rough stepdad or  
11 babysitter who's beating the hell out of the kid  
12 regularly versus the person on the other end of the  
13 spectrum who doesn't do it at all. And in this case  
14 we're in the middle, and that's what makes it tough.

15              Kirk is pointing at a number of occasions  
16 where he's saying, "Look, read between the lines.  
17 This guy is a little rough with this two- or  
18 three-year-old little girl." And yeah, I agree, a  
19 little rough, but neither the bruise incident or the  
20 rock incident, dragging through the rocks is  
21 sufficient to overcome the prejudicial and probative  
22 value of the scale and the relevant clear and  
23 convincing scale. I just don't see it sufficiently.  
24 Those two are out.

25              The UMC Quick Care mark on the chin, cut on



1 the chin is in. It's an argument that's going to go  
2 to the weight of the jury. You're both going to argue  
3 it, similar to what you did with me today.  
4 Mr. Martinez and Ms. Boskovich are going to say to the  
5 jury, "It was an accident. The little girl said it  
6 was an accident. If it shows anything, it shows a  
7 propensity for accidents in the shower, mistakes. It  
8 happened this time; happened the next time."

9 Kirk's going to argue the other circular  
10 argument of that, which is he was rough. "He was  
11 rough that time. He's rough this time." And it will  
12 go to the weight of the evidence, and the jury will  
13 decide how much weight to give it for the point that  
14 Kirk's bringing it in for.

15 But to me, the similarities of the facts  
16 are sufficient for prior bad act to bring into this  
17 case. We can offset the prejudice with the jury  
18 instruction, of course.

19 And the last one is the series of photos  
20 that were taken off the phone that shows the child sad  
21 or throwing a fit or whatever. Kirk's argument is  
22 basically it shows the fear this little girl had and  
23 how he was too rough with her. The Defense's argument  
24 was it shows a three-year-old throwing a fit. I  
25 weighed it in my head. There's just not enough clear

1 and convincing to show me that this was a case of  
2 these pictures were him being rough with the child and  
3 terrorizing her and then he snapped the photo and sent  
4 it to mom. I tend to believe in that scenario after a  
5 few of those pictures, mom would come up and say,  
6 "What the hell are you doing sending me these  
7 pictures," and I didn't hear any testimony of that.

8 I don't quite understand taking pictures of  
9 these scenarios. I've never heard of anybody in life  
10 doing it before; this is the first. And I don't  
11 understand. It's like the guy who molests kids  
12 wanting to take pictures of it happening so he can  
13 look at it in the future. Or is it just a case of  
14 he's tattling on the little girl to mom, which I don't  
15 understand how that works in real life, but it's not  
16 enough for me.

17 Anything else you needed me to decide  
18 today?

19 MR. VITTO: Just a little clarification,  
20 Judge, because I know if we don't address it now, we  
21 will be addressing it in the future. So the UMC  
22 records are coming in, but you said no to the photos.

23 THE COURT: The photo of the chin can come  
24 in.

25 MR. VITTO: The photo of -- there were two

1 chin photos.

2 THE COURT: Just the one.

3 MR. VITTO: Which one?

4 THE COURT: Marked as State's Exhibit 1.

5 MR. VITTO: Got it. Thanks, Judge.

6 MR. MARTINEZ: Judge. What about the --

7 THE COURT: And the reason why is the  
8 autopsy photos, they're going to come in, as  
9 Mr. Martinez noted a number of times in closing  
10 argument. Those are going to come in, and you're  
11 going to make the argument, "Look how close the two  
12 chin marks are," or whatever.

13 MR. MARTINEZ: And that's what I was just  
14 going to ask, Judge. If we're admitting them now so  
15 they're already admitted, or are we going to wait and  
16 let the State do that as far as the trial.

17 THE COURT: Well, we're admitting them for  
18 the purposes of the Petrocelli. We still have to meet  
19 foundational purposes and everything at the trial.

20 MR. VITTO: Thanks, Judge.

21 THE COURT: They don't come in magically.  
22 Anything else I need to decide today?

23 MR. VITTO: I think we're good.

24 THE COURT: All right. The trial is set  
25 for --

1 MR. VITTO: November 2.

2 THE COURT: -- November 2, and a calendar  
3 call is --

4 COURT STAFF: October 5th.

5 THE COURT: -- October 5th. All right.

6 We'll see you then.

7 MR. VITTO: Thank you very much.

8 THE BAILIFF: All rise.

9 (The proceedings concluded at  
10 4:25 p.m.)  
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## REPORTER'S CERTIFICATE

STATE OF NEVADA )  
 ) ss  
COUNTY OF NYE )

I, Cecilia D. Thomas, official reporter of the Fifth Judicial District Court of the State of Nevada, in and for the County of Nye, do hereby certify:

That I reported the taking of the proceedings at the time and place aforesaid;

That I thereafter transcribed my said shorthand notes into typewriting, and that the typewritten transcript of said proceedings is a complete, true, and accurate record of statements provided by the parties at said time, to the best of my ability.

I further certify that I am not a relative, employee, or independent contractor of counsel of any of the parties involved in said action; nor a person financially interested in the action; nor do I have any other relationship with any of the parties or with counsel of any of the parties involved in the action that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have hereunto set my hand in the County of Nye, State of Nevada, this 25th day of August 2020.

*Cecilia D. Thomas*

Cecilia D. Thomas,  
RPR, CCR No. 712

SEP 14 2020

Nye County Clerk  
Deputy

~~Terri Pemberton~~

Case No. CR 9226  
Dept. 2P

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE

THE STATE OF NEVADA,

Plaintiff,

-v-

COLE D. ENGELSON,

Defendant,

AMENDED

ORDER SETTING JURY TRIAL

IT IS SO ORDERED that the above-captioned case is hereby set for trial before a jury in Pahrump, Nevada, commencing at 9:00 o'clock a.m. on Wednesday the 4<sup>th</sup> of November 2020. Any lengthy pre-trial motions should be scheduled with the Court. Three (3) weeks have been set aside for the trial. The services of the District Court Reporter are required.

IT IS FURTHER ORDERED that a calendar call is set for the 5<sup>th</sup> day of October 2020, at the hour of 9:00 a.m. Counsel and the defendant must appear for the calendar call.

DATED this 14<sup>th</sup> day of September 2020.

  
DISTRICT JUDGE

FIFTH JUDICIAL DISTRICT COURT  
ESMERALDA AND NYE COUNTIES





**CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on the 14<sup>th</sup> day of September 2020, she mailed (or hand delivered) copies of the foregoing ORDER to the following:

NYE COUNTY DISTRICT ATTORNEY'S OFFICE  
PAHRUMP, NV  
(HAND DELIVERED)

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

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

*Nancy L. Pratty for:*  
LOUISE MULVEY, Secretary to  
DISTRICT JUDGE



FILED  
FIFTH JUDICIAL DISTRICT

OCT 27 2020

Nye County Clerk  
**Juanita Torres**  
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.

**MOTION TO DISQUALIFY THE NYE**  
**COUNTY DISTRICT ATTORNEY'S**  
**OFFICE**

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 to disqualify the Nye County District Attorney's Office and appoint a special prosecutor on the instant case because the Defendant's former counsel is now an employee of the District Attorney's Office.

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 27<sup>th</sup> day of October, 2020.

Daniel Martinez Law, LLC

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

1  
2 **NOTICE OF MOTION**

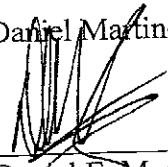
3 TO: Nye County, Plaintiff; and

4 TO: District Attorney, its Attorneys;

5 PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Disqualify  
6 the Nye County District Attorney's Office on Calendar for hearing in Department 2 of the above-  
7 entitled Court on the 29 day of Oct, 2020, at 8:15 a.m. or as soon thereafter as counsel may  
8 be heard.

9 DATED this 27<sup>th</sup> day of October, 2020.

10 Daniel Martinez Law, LLC

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13 Daniel E. Martinez, Esq.  
14 Nevada Bar No.: 12035  
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**POINTS AND AUTHORITIES**  
**FACTUAL BACKGROUND**

In July of 2018, Attorney Brent Percival, Esq. was awarded a contract as one of the Nye County Public Defenders. Shortly thereafter, he was appointed to represent the Defendant, Cole Engelson, who is charged with First Degree Murder in the instant matter. During his representation, Mr. Percival met and spoke with the Defendant, having privileged communications. He made appearances in Court, filed and argued motions, and procured an expert witness for the Defense. However, Mr. Percival had a tumultuous relationship with the Defendant. During the pretrial proceedings, the Defendant motioned the Court to fire Mr. Percival and allow him to proceed *pro se*. The Defendant also made accusations that Mr. Percival was violating the attorney-client relationship by sharing their privileged communications with parties not privy to the case. The breakdown in communication, coupled with a major medical event to Mr. Percival, ultimately led the Court to take Mr. Percival off the case and appoint the current counsel, Daniel E. Martinez, Esq. and Ronni N. Boskovich, Esq. in March of 2020.

Recently, Mr. Percival gave notice to Nye County that he would be relinquishing his contact so he could accept employment with the Nye County District Attorney's Office – the very same office that is prosecuting the case against the Defendant. Mr. Percival gave his contractually required 90-days-notice to the County; however, he requested that the Contract be terminated in less than 90 days. Specifically, he sent an email to the Chairman of the Board of County Commissioners on September 24, 2020, explaining that his intentions were to commence work with the Nye County District Attorney's Office no later than November 1, 2020. During the hearing before the County Commission, which was held on October 6, 2020, Chris Arabia, the Elected Nye County District Attorney stated that "Mr. Percival's joining the District Attorney's Office, and because of that and the position that he's in now it is really imperative that we do this as quickly as possible. No one benefits from a lag here. It will cause all kinds of logistical problems. There are some complications with the move that he's making but we can minimize that by getting it done as quickly as possible....so I think it would be best, certainly

1 for the County, and best for Mr. Percival, if we can do this quickly.” That resolution passed unanimously  
2 with the Nye County Board of County Commissioners, and Mr. Percival’s last day as a public defense  
3 was Friday, October 23, 2020. The following Monday, October 26, 2020, Mr. Percival began his  
4 employment as a Deputy District Attorney with the Nye County District Attorney’s Office. The  
5 Defendant’s case is set to begin trial on November 4, 2020.

### 6 ARGUMENT

7  
8 The Office of the District Attorney occupies a privileged place in our criminal justice system,  
9 but where great power is bestowed, great responsibility is expected. As the United States Supreme Court  
10 held over 70 years ago, a prosecutor is “the representative not of an ordinary party to a controversy, but  
11 of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at  
12 all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice  
13 shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

14 Similarly, in 1983 the Nevada Supreme Court held that “vicarious disqualification [of a  
15 prosecutor] may be warranted in extreme cases where the appearance of unfairness or impropriety is so  
16 great that the public trust and confidence in our criminal justice system could not be maintained without  
17 such action.” *Collier v. Lagakes*, 98 Nev. 307, 310 (1982).

18 *Collier* quoted *State v. Tippercanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982), which  
19 stated:

20 [E]thical rules require that a lawyer should avoid even the appearance of  
21 professional impropriety and that in certain situations the disqualification of one lawyer  
22 within a law firm means that all members of the firm are also disqualified. Canons 5 and  
23 9, DR 5-105(D). While this principle is strictly enforced in the context of civil actions  
24 conducted by private law firms, it is less strictly applied to government agencies. Where a  
25 lawyer who has represented a criminal defendant on prior occasions is one of the deputy  
26 prosecutors, disqualification of the entire office is not necessarily appropriate. Individual  
27 rather than vicarious disqualification may be the appropriate action, depending upon the  
28 specific facts involved.

26 However, *Collier* clarified, stating that such an extreme case warranting disqualification might  
27 exist even where the state has established an effective screen precluding the individual lawyer’s direct  
28 or indirect participation in the prosecution. *Collier v. Lagakes*, 98 Nev. 307, 310 (1982). Additionally

1 a District Court cannot grant a motion to disqualify without first holding an evidentiary hearing and  
2 considering all of the facts and circumstances. *Id.*

3 For the reasons set forth in greater detail below, the case at bar presents exactly the sort of  
4 "extreme" case where appointment of a special prosecutor to represent the State in place and stead of  
5 the Nye County District Attorney's office is warranted. *Collier, Id.*, at 311.<sup>1</sup>

6 Under Nevada Rules of Professional Conduct ("NRPC") Rule 1.11, which applies to  
7 Government Officers, when a lawyer is disqualified from representation, no lawyer with which that  
8 lawyer is associated may knowingly undertake or continue representation in such a matter as well. (*See*  
9 *also* Nev. S.C.R. 160 regarding imputed disqualification.)

10 Rule 1.7(a) states that "a lawyer shall not represent a client if the representation involves a  
11 concurrent conflict of interest." A concurrent conflict of interest exists if "[t]here is a significant risk  
12 that the representation of one or more clients will be materially limited by the lawyer's responsibilities  
13 to another client, a former client or a third person..." NRPC 1.7(a)(2).

14 Additionally, lawyers shall not represent a person whose interests are materially adverse to a  
15 former client, and about whom the lawyer has acquired confidential information protected by NRPC  
16 1.6. NRPC 1.9(c).

17 NRPC, rule 1.8(m) states that a conflict of interest for any single attorney in a law firm "shall  
18 apply to all of them." Thus, a conflict of interest for one attorney in an office, amounts to a conflict of  
19 interest to all attorneys in that office. For the purpose of assessing conflicts, Deputy District Attorneys  
20 are indistinguishable. They are one in the same, and a conflict assessed to one is assessed to all. *See*  
21 *Koza v. Eighth Judicial Dist. Court*, 99 Nev. 535, 536-37, 665 P.2d 244, 245 (1983), making the  
22 argument for Public Defenders, but the same applies to District Attorneys.

23 In this case, there is now a clear conflict of interest with the Nye County District Attorney's  
24 Office. *Tippercanoe* addressed whether there was a conflict of interest when the elected prosecuting  
25 attorney represented the defendant in two *prior* cases, and the Court ultimately held there was not always  
26 a conflict, but in that particular case there was a conflict due to the totality of facts and circumstances.  
27 This biggest difference between *Tippercanoe* and this case is that a current employee of the Nye County

28 <sup>1</sup> A decade after *Collier*, the Nevada Supreme Court held that the Attorney General "lacks authority to act as a special prosecutor" in situations where the District Attorney is disqualified. *Atty. Gen. v. Eighth Jud. Dist. Ct. (Morris)*, 108 Nev. 1073, 1075 (1992).



District Attorney's Office represented the Defendant in the *current* case. If the *Tippercanoe* Court found that there was a conflict when the prosecutor represented defendant in two prior cases, there is certainly a conflict when a prosecutor in the District Attorney's Office represented the Defendant in a case currently being prosecuted by that prosecutor's office.

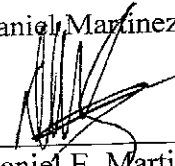
The appearance of impropriety could not be greater or more extreme than it is in this case. Mr. Percival, with his intimate knowledge of the case and privileged communications with the Defendant, began work as a Deputy District Attorney with the office prosecuting the very same Defendant the week prior to trial. Special proceedings had to take place within the County in order to allow Mr. Percival to begin his employment as soon as he did. During those proceedings, the Nye County District Attorney, who is currently prosecuting the Defendant, urged the Board of County Commissioners to allow Mr. Percival to be relieved of his contractual obligations two months prior to the standard 90-day-notice period, so that Mr. Percival could start working before Mr. Engelson's jury trial begins. Furthermore, Mr. Engelson has accused Mr. Percival of sharing privileged communication in the past. If that is true, there is nothing that can guarantee Mr. Percival will not share privileged communication with the Nye County District Attorney's Office. This conflict cannot be resolved, even with an effective screen keeping Mr. Percival away from the case. There is still an appearance of impropriety and the bias is nevertheless presenting itself.

### CONCLUSION

By hiring Brent Percival, and specifically requesting that he begin his employment as soon as he did, the Nye County District Attorney's Office created a clear conflict of interest. As such, this Court should issue an Order disqualifying the Nye County District Attorney's Office, and appoint a special prosecutor on this case.

DATED this 27<sup>th</sup> day of October, 2020.

Daniel Martinez Law, LLC


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

1 **CERTIFICATE OF SERVICE**

2 I, Daniel E. Martinez, Esq., Nye County Public Defender and counsel for the Defendant,  
3  
4 COLE D. ENGELSON, do hereby certify that I have served the following:  
5 **Defendant's Motion to Disqualify the Nye County District Attorney's Office in**  
6 **Case No. CR9226**  
7 **State v. Cole D. Engelson**

8 upon said Plaintiff by delivering a true and correct copy thereof on October 27, 2020, to the following:

9  
10 **NYE COUNTY DISTRICT ATTORNEY'S OFFICE**

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12 \_\_\_\_\_  
13 Daniel E. Martinez, Esq.  
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DANIEL MARTINEZ LAW