IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MONICA TRUJILLO, DISTRICT JUDGE, Respondents, and BRANDON ALEXANDER MCGUIRE, Real Party in Interest.	)	Case No. 83269

REAL PARTY IN INTEREST'S APPENDIX TO MOTION TO DISQUALIFY JUSTICE HERNDON

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INDEX
APPENDIX TO MOTION TO DISQUALIFY HERNDON (MCGUIRE)

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

OCT 18 2017

BY DULCE MARIE ROMEA, DEPUTY

IND
STEVEN B. WOLFSON
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Nevada Bar #001565
PAMELA WECKERLY
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Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRANDON ALEXANDER MCGUIRE,
#1265445

Defendant.

CASE NO: C-17-327272-1

DEPT NO: III

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant above named, BRANDON ALEXANDER MCGUIRE, accused by the Clark County Grand Jury of the crime(s) of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001); SEXUAL ASSAULT (Category A Felony - NRS 200.364, 200.366 - NOC 50095); FIRST DEGREE KIDNAPPING (Category A Felony - NRS 200.310, 200.320 - NOC 50051) and MURDER (Category A Felony - NRS 200.010, 200.030 - NOC 50000), committed at and within the County of Clark, State of Nevada, on or between May 6, 1997 and October 22, 1999, as follows:

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

did on or about May 6, 1998 willfully, unlawfully, feloniously and with malice aforethought, kill ANNIE MILLER, a human being, with use of a deadly weapon, to-wit: an unknown object, by striking the said ANNIE MILLER about the head and/or body with his

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fist and/or said unknown object, the said killing having been willful, deliberate and premeditated.

COUNT 2 - SEXUAL ASSAULT

did on or about May 6, 1998 then and there willfully, unlawfully, and feloniously sexually assault and subject ANNIE MILLER, a female person, to sexual penetration, to-wit: fellatio: by placing his penis on or in the mouth of the said ANNIE MILLER, against her will, or under conditions in which Defendant knew, or should have known, that ANNIE MILLER was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct.

COUNT 3 - FIRST DEGREE KIDNAPPING

did on or about May 6, 1998 willfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away ANNIE MILLER, a human being, with the intent to hold or detain ANNIE MILLER against her will, and without her consent, for the purpose of committing sexual assault.

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COUNT 4 - MURDER

did on or about October 22, 1999 willfully, unlawfully, feloniously and with malice aforethought, kill ELVIA MCGUIRE, a human being, by striking the said ELVIA MCGUIRE in the head with his fist and/or an unknown object and/or by manner and means unknown did cause blunt force trauma to the head of the said ELVIA MCGUIRE, the said killing having been willful, deliberate and premeditated.

DATED this 17th day of October, 2017.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY 10/13 For
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

ENDORSEMENT: A True Bill

Foreperson, Clark County Grand Jury

Names of Witnesses and testifying before the Grand Jury:

BROWN, JENNIFER M., LVMPD #10074

HANNA, LARRY, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

HEFNER, KENNETH R., LVMPD #2185

KING, CRAIG W., LVMPD #9971

MONTECERIN, ROLANDO, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

OKELLEY, DEAN F., LVMPD #4209

SAVALA, DARLENN, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

SAVALA, RUBEN III, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

VITA, VENITA, LVMPD

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

BRAIN, STACIA, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

BURNS, LARRY, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

CODY, LORA J., LVMPD #7294

CUSTODIAN OF RECORDS, CCDC

CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS, LVMPD RECORDS

GREEN, SHELDON, DR., c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

LENDIN, RENE, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

LOPEZ, LISA, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

MARIN, THOMAS, LVMPD #9577

MCGUINESS, SCOTT, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

MCNETT, MARK, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

MILLER, BUTCH, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

MILLER, CYNTHIA, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

MILLER, RICKY, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

NORMAN, SHEREE, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

RUFFINO, D., c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

TELGENHOFF, GARY, DR., c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

WOODALL, STACEY, c/o CCDA, 200 Lewis Avenue, Las Vegas, NV

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LVMPD EV# 9805061577; 9912100605
(TK8)

NISD
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRANDON ALEXANDER MCGUIRE,
#1265445

Defendant.

CASE NO: C-17-327272-1

DEPT NO: III

STATE'S NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC DIGIACOMO, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person who, at anytime before a penalty hearing is conducted pursuant to NRS 175.552, is or has been convicted of: (b) A felony involving the use or threat of violence to the person of another. (NRS 200.033 (2)(b)).

To establish this aggravating circumstance, the State will rely upon the jury's verdict in case C-16-319756, the State of Nevada v. Brandon McGuire. In that case, McGuire is charged with two counts of Sexual Assault with Use of a Deadly Weapon on March 11, 2004. In that case, McGuire subjected the victim to forced penetration digitally as well as with forced her to perform fellatio on him with the use of a knife. Each count would constitute a separate aggravating circumstance. The case is currently set for trial on September 10, 2018.

2. The murder was committed by a person who, at anytime before a penalty hearing is conducted pursuant to NRS 175.552, is or has been convicted of: (b) A felony involving the use or threat of violence to the person of another. (NRS 200.033 (2)(b)).

To establish this aggravating circumstance, the State will rely upon the jury's verdict in Case C-16-19413-1, The State of Nevada v. Brandon Maguire. In that case, McGuire is charged with Felony Battery Constituting Domestic Violence, Strangulation for conduct which occurred on May 24, 2016 in which McGuire used force or violence by strangulation upon the person of Andrea Huerta, a person with whom McGuire shares a child. The case current has a date of February 22, 2018, for trial setting in District Court XVII.

3. The murder was committed by a person who, at anytime before a penalty hearing is conducted pursuant to NRS 175.552, is or has been convicted of: (b) A felony involving the use or threat of violence to the person of another. (NRS 200.033 (2)(b)).

To establish this aggravating circumstance, the State will rely on the jury's verdict in the instant case, C-17-327272. In the instant case, McGuire is charged in Count 2 with Sexual Assault, for conduct which occurred on or about May 6, 1998. On that date, McGuire sexually assaulted Annie Miller, by placing his penis inside the mouth of Miller against her will or under conditions in which the defendant knew, or should have known that Miller was mentally or physically incapable of resisting.

4. The murder was committed by a person who at anytime before a penalty hearing is conducted pursuant to NRS 175.552, is or has been convicted of (b): A felony involving the use or threat of violence to the person of another. (NRS 200.033 (2)(b)).

To establish this aggravating circumstance, the State will rely on the jury's verdict in the instant case, C-17-327272. In the instant case, McGuire is charged in Count 3 with First Degree Kidnapping, for conduct which occurred on or about May 6, 1998. On that date, McGuire, willfully, unlawfully, and feloniously, seized, confined, inveigled, enticed, decoyed, abducted, concealed, kidnapped or carried away Annie Miller with the intent to hold or detain her against her will, without her consent, for the purpose of committing sexual assault.

5. The person subjected the victim to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. (NRS 200.033 (13)).

To establish this aggravating circumstance, the State will rely on the jury's verdict in the instant case, C-17-327272. In the instant case, McGuire is charged in Count 2 with Sexual Assault, for conduct which occurred on or about May 6, 1998. On that date, McGuire sexually assaulted Annie Miller, by placing his penis inside the mouth of Miller against her will or under conditions in which the defendant knew, or should have known that Miller was mentally or physically incapable of resisting.

6. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. (NRS 200.033(12)).

To establish this aggravating circumstance, the State will rely on the jury's verdict in the instant case. In Counts 1 and 4, McGuire is charged with Murder with Use of a Deadly Weapon and Murder respectively. The facts underlying this aggravating circumstance are that on or about May 6, 1998, McGuire willfully, unlawfully, feloniously and with malice aforethought, killed Annie Miller, with an unknown blunt object. In addition, on or about October 22, 1999, McGuire willfully, unlawfully, feloniously and with malice aforethought killed Elvia McGuire by striking Elvia McGuire in the head with his fists and/or an unknown object or manner and means unknown, causing the death of Elvia McGuire

DATED this 13th day of November, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Marc DiGiacomo
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

///

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Notice of Intent to Seek the Death Penalty, was made this 13th day of November, 2017, by Electronic Filing to:

SCOTT L. BINDRUP
EMAIL: sbindrup@clarkcountynv.gov

ROBERT ARROYO
EMAIL: rarroyo@clarkcountynv.gov

ELIZABETH (LISA) ARAIZA, Legal Secretary,
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BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

16F18260X/MD/saj/MVU

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7/7/2021 7:40 AM
Steven D. Grierson
CLERK OF THE COURT

NOTM
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BRANDON MCGUIRE
#126445

Defendant.

CASE NO: **C-16-319756-1**

DEPT NO: **III**

HEARING DATE REQUESTED

STATE'S NOTICE OF MOTION AND MOTION TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS PURSUANT TO NRS 48.045(3), NRS 48.061 AND NRS 48.045(2)

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through LINDSEY MOORS, Chief Deputy District Attorney, will bring a **Motion to Admit Evidence of Other Crimes, Wrongs or Acts Pursuant to NRS 48.045(3), NRS 48.061 and NRS 48.045(2)** before the above entitled Court **on a day and time to be determined by the Clerk of the Court.**

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

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STATEMENT OF FACTS PERTINENT TO THIS MOTION

Defendant BRANDON MCGUIRE is charged by way of Indictment with two count of SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366 - NOC 50095). The crimes occurred in March of 2004. On March 11, 2004, Evelyn Miller was walking to meet her friend near the area of Lake Mead and Rock Springs. GJT at 8. As she was walking, Defendant approached her while driving his car, and told her "You have to come in." Id. She listened to him and got in the car with him. Id.

They left and drove to Wendy's, where they went through the drive-through, ordered food, and ate while driving on the 95 freeway. Id. at 9. After they finished eating, Defendant slapped Miller in the face and continued to hit her three more times as he swerved across the road. Id. Defendant then pulled out a knife and pressed it against Miller's leg until it injured her leg. Id. at 11. Miller was terrified Defendant was about to kill her. Id.

Defendant then ripped off Miller's underwear and inserted his fingers in her vagina while he continued to drive. Id. at 12. After a couple of minutes, Defendant grabbed Miller's head, pushed her head into his groin, and inserted his penis into her mouth. Id. He continued to push Miller's head down harder and harder, which hurt her mouth and gagged her. Id. Defendant did this until he ejaculated into Miller's mouth and onto her face. Id. Then he continued to beat Miller until he pushed her out of his car and left. Id at 9.

When he pushed her out, Miller noticed her purse containing her ID card and other important belongings were still in the car. Id. at 14. She attempted to grab her purse from his car, but Defendant slammed the door shut and drove off. Id.

STATEMENT OF FACTS REFERENCE CASE C327272 – VICTIM ANNIE MILLER

On May 6, 1998, Annie Miller's dead body was found in a remote part of Las Vegas near Bonnie Springs. Supp. GJT. At 49. Investigators found DNA evidence linked to Defendant at the scene on Miller's body. Id. Investigators were able to deduce Defendant sexually assaulted Miller. Id. at 61-62. Defendant penetrated Miller's mouth with his penis continuously until he ejaculated into her mouth and onto her skirt. Id. at 61-63, 66. It is unknown where or what exact time the sexual assault occurred. Id.

Miller was then forced to walk out into the desert barefoot with her shirt pulled up. Id. at 52. At some point, Defendant forced her to stop, where he then picked up an irregular object, most likely a rock, and hit her in the head with it several times. Id. at 50-53. Defendant killed Miller with the blows, with the official cause of death being a massive skull fracture and blunt force trauma to the head. Id. at 53. Defendant then dragged Miller's body away from the scene to an area that was undisturbed and left. Id. at 51-52.

LEGAL ARGUMENT

I. PURSUANT TO NRS 48.045(3), EVIDENCE OF DEFENDANT'S PRIOR CONVICTION FOR A SEXUAL OFFENSE IS ADMISSIBLE IN THE SUBJECT CASE

NRS 48.045, provides in relevant portion:

> "1. Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . .
> **3. Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097."**

(Emphasis added).

Further, NRS 179D.097 defines "sexual offense" as follows:

> **(a)** Murder of the first degree committed in the perpetration or attempted perpetration of sexual assault or of sexual abuse or sexual molestation of a child less than 14 years of age pursuant to paragraph
>
> (b) of subsection 1 of NRS 200.030.
>
> ***(b) Sexual assault pursuant to NRS 200.366.***
>
> **(c)** Statutory sexual seduction pursuant to NRS 200.368.
>
> ***(d) Battery with intent to commit sexual assault pursuant to subsection 4 of NRS 200.400.***
>
> **(e)** An offense involving the administration of a drug to another person with the intent to enable or assist the commission of a felony pursuant to NRS 200.405, if the felony is an offense listed in this subsection.

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> **(f)** An offense involving the administration of a controlled substance to another person with the intent to enable or assist the commission of a crime of violence pursuant to NRS 200.408, if the crime of violence is an offense listed in this section.
>
> **(g)** Abuse of a child pursuant to NRS 200.508, if the abuse involved sexual abuse or sexual exploitation.
>
> **(h)** An offense involving pornography and a minor pursuant to NRS 200.710 to 200.730, inclusive.
>
> **(i)** Incest pursuant to NRS 201.180.
>
> **(j)** Open or gross lewdness pursuant to NRS 201.210.
>
> **(k)** Indecent or obscene exposure pursuant to NRS 201.220.
>
> **(l)** Lewdness with a child pursuant to NRS 201.230...

The amendments to NRS 48.045 are like statutes drafted in several other states including: Cal. Evid. Code Sec. 1108; Ariz. R. Evid. 404; Alaska R. Evid. 404; Fla. Stat. Sec. 90.404; Official Code of Georgia Sec. 24-4-413; Illinois Compiled Statutes Sec. 5/115-7.3; Louisiana Statutes, Art. 412.2; and Utah Rule of Evidence 404; Kansas Statutes, Sec. 21.5502. As currently amended, NRS 48.045 is almost identical to amendments made to the California Evidence Code in the mid 1990's and subsequently upheld by the California Courts. Additionally, the reasoning of the Nevada Legislature in enacting such amendments was like the reasoning of the California legislature.

California Evidence Code, section 1108 was added effective January 1, 1996. The statute has since been determined to be valid and constitutional. See People v. Fitch 55 Cal. App. 4th 172, 177-86 (1997). Specifically, the California Supreme Court, in upholding section 1108, emphasized the legislative history behind section 1108: "the Legislature's principal justification for adopting section 1108 was a practical one: by their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." People v. Falsetta 21 Cal. 4th 903, 915 (1999). Indeed, the Court explained that the "'Legislature has determined the need for this evidence is 'critical' given the serious and

secretive nature of sex crimes and the often-resulting credibility contest at trial.'" Id. at 911 (citation omitted).

Like the effect of the subject amendment to NRS 48.045, California's Section 1108 explicitly supersedes Evidence Code, section 1101's prohibition of evidence of character or disposition. See People v. Soto 64 Cal. App. 4th 966, 984 (1998). The purpose of Section 1108 is to permit trial courts to admit prior sexual assault evidence on a common sense basis, without a precondition of finding a "non-character" purpose for which it is relevant, so that juries are able to rationally assess such evidence. Id. at 983-84. This rational assessment "includes consideration of other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused." Id. at 984 (citation omitted).

Evidence of prior sexual conduct is highly probative and is admissible as propensity evidence. As has been indicated in the analogous federal rules, the "presumption is in favor of admission." Id. at 989 (quoting United States v. Sumner 119 F. 3d 658, 662 (8th Cir. 1997)). The California Supreme Court further held that Section 1108 "implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." People v. Villatoro, 281 P.3d 390 (Cal. 2012); See also; Falsetta, 21 Cal.4th at 911.

The admission of such evidence is, of course, subject to other provisions of the rules of evidence including NRS 48.025 which provides '(1) All relevant evidence is admissible." And, NRS 48.035 which provides in relevant part:

> (1) Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

Pursuant to NRS 48.045 and NRS 48.035, like Cal. Evid. Code Section 1108, if the current offenses and the prior offenses are ones defined as qualifying "sexual offenses," the prior offenses are admissible unless the trial court finds them to be inadmissible pursuant to NRS 48.035. See People v. Branch 91 Cal. App. 4th 274, 281 (2001).

In the instant case, pursuant to NRS 48.045(3), evidence of Defendant's sexual offense against Annie Miller in Case C327272 involving Sexual Assault is included in the definition of NRS 179D.097. NRS 48.045 does not require that the defendant has been ***convicted*** of such

offense: it explicitly allows "evidence in a criminal prosecution for a sexual offense that a person ***committed*** another crime, wrong or act that constitutes a separate sexual offense" (emphasis added).

In Franks v. State, 432 P.3d 752, 135 Nev.Adv.Op 1 (2019), the Nevada Supreme Court held:

> We conclude that NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense.

Id., 432 P.3d 752 at 755.

The Court further noted that no Petrocelli hearing is necessary, as sexual offenses are excluded from the requirements of NRS 48.045(1) and (2). The Court then set forth a three-part analysis for district courts to adhere to when determining whether evidence is admissible under NRS 48.045(3):

> Therefore, prior to its admission under NRS 48.045(3), the district court must determine that the prior bad sexual act is (1) relevant to the crime charged, (2) proven by a preponderance of the evidence, and (3) weighed to determine that its probative value is not substantially outweighed by the danger of unfair prejudice as articulated by United States v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001).

Id.

A. Relevant to the crime charged

In determining whether the evidence is relevant to the crime(s) charged, the Court stated:

> First, similar to the Petrocelli framework, we conclude that the State must request the district court's permission to introduce the evidence of the prior sexual offense for propensity purposes outside the presence of the jury. See Bigpond, 128 Nev. at 117, 270 P.3d at 1250. The State must then proffer its explanation of how the prior sexual offense is relevant to the charged offense, i.e., tends to make it more probable that the defendant engaged in the charged conduct. See NRS 48.015.

Id., 432 P.3d 752 at 756.

Evidence that this Defendant has previously committed a violent sexual assault falls squarely within the definition of "sexual offense" under NRS 179D.097; and, the evidence is extremely relevant because it shows his propensity to commit violent sexual assaults, making

it more probable that he engaged in the charged conduct.

B. Proven by a preponderance of the evidence

Regarding the burden the State must meet to admit the evidence, the Court stated:

> ... prior to the admission of prior sexual offense evidence for propensity purposes under NRS 48.045(3), the district court must make a preliminary finding that the prior sexual offense is relevant for propensity purposes, and that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred.

The Court weighed two factors in Franks, 432 P.3d 752, 757 when deciding whether the Defendant there met the burden. There, the court considered the similarities between the two sexual assaults and the previous victim's testimony. Here, the State has significant DNA evidence and if the motion is granted, would show through this evidence the similarities between the two sexual assaults. In both sexual assaults Defendant penetrated each victim orally, left semen on their bodies, and then abandoned them in a remote area. This far surpasses the preponderance of the evidence standard required by our Supreme Court.

Further, this court should not give weight to the argument that because Annie Miller cannot testify, the State cannot meet its burden. Defendant stripped this court of the ability to weigh Miller's testimony when he killed her. Thus, the court should only consider the similarities between the two assaults, and on that factor alone the State can meet its burden.

C. Weighed to determine that its probative value is not substantially outweighed by the danger of unfair prejudice

Finally, the Supreme Court noted that the district court must conduct a weighing analysis to determine whether the evidence's probative value is *substantially* outweighed by the risk of unfair prejudice. In conducting this analysis, the Court requires that the factors set forth in United States v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001) be addressed: (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

1. The Similarity of the Acts Charged

In Franks, the court noted that the prior acts and the act for which Franks was charged were identical, thus weighing in favor of the probative value of the evidence. Likewise, in this case, Defendant's acts are similar. They involve committing sexual assault involving penis to oral penetration of an adult female. In both instances, the sexual assaults are violent. In the Miller case, Defendant raped her by penetrating her mouth and then beat her over the head with a rock and killed her. In the instant case, Defendant raped Hicks by penetrating her mouth and then continuously beat her head with his fists before and after the penetration. Thus, the similarity of the events is very high.

2. The Closeness in Time of the Prior Acts to the Acts Charged

In Franks, the victim could not testify as to the exact dates when the prior sexual acts occurred. The Court did not take issue with this fact, citing LeMay (reasoning that the lapse of 12 years between trial and the prior sexual offenses did not render admission of relevant evidence of the similar prior acts an abuse of discretion). Here, approximately 6 years lapsed between the two events. See infra for further discussion on alleged remoteness.

3. The Frequency of the Prior Acts

This factor was not addressed by Franks, and the application of the factor as set forth in LeMay likewise received little analysis:

> The "frequency of events" factor discussed in Glanzer also cuts in favor of the government. Although it was not introduced at trial, the government also had evidence of a third incident in which LeMay had sexually abused his young relatives. True, this incident occurred even before the 1989 abuse of his cousins when LeMay himself was extremely young, and, as the prosecutor noted, was "triple hearsay." However, that there was evidence of a third similar incident suggests that LeMay's abuse of his cousins in 1989 was not an isolated occurrence.

LeMay at 1029. Here, the "frequency of events" factor certainly appears to weigh in favor of the State.

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4. The Presence or Lack of Intervening Circumstances

The Franks Court noted that there were no "intervening circumstances that would alter the balance of the acts probative value and risk of unfair prejudice." Likewise, there are no intervening circumstances in the instant case that would alter this analysis.

5. The Necessity of the Evidence beyond the Testimonies Already Offered at Trial

In Franks, the Court addressed this factor as follows:

> Lastly, while evidence regarding the prior bad acts may not have been necessary to establish the State's case, the "evidence need not be absolutely necessary to the prosecution's case in order to be introduced; it must simply be helpful or practically necessary."

This analysis also applies to the instant case. While the evidence of Defendant's sexual assault of Annie Miller may or may not be absolutely necessary, it is certainly helpful to the State's case. Additionally, it is "practically necessary" in the sense that the State must prove to 12 people beyond a reasonable doubt that Defendant committed the acts alleged. The probative value that Defendant sexually abused Annie Miller in substantially the same way as the instant offense is enormous; and, it cannot be said to be substantially outweighed by the risk of unfair prejudice. The defense will no doubt be one of consent, considering the DNA evidence found in Hick's sexual assault kit, confirming that it was in fact Defendant who assaulted her. Thus, Hick's credibility will be a key part of this case, and Defendant's committing a similar offense years earlier is practically necessary.

Our Supreme Court has now made it abundantly clear that NRS 48.045(3) unequivocally indicates the legislature's intent to allow admission of the type of evidence the State seeks to admit in this case ***for propensity purposes***. As the 9th Circuit stated in United States v. Mahler, "evidence relevant to a defendant's motive is not rendered inadmissible because it is of a highly prejudicial nature. . . . The best evidence often is." 452 F.2d 547 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069, 92 S. Ct. 1517, 31 L. Ed. 2d 801 (1972). Thus, evidence of Defendant's prior sexual offenses involving Annie Miller should be admitted in this case for propensity purposes.

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II. EVIDENCE OF DEFENDANT'S PRIOR SEXUAL ASSAULT IS ADMISSIBLE AS EVIDENCE CONCERNING THE DEFENDANT'S MOTIVE, STATE OF MIND, INTENT, AND ABSENCE OF MISTAKE UNDER 48.045(2)

NRS 48.045(2) provides:

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

Previously the law stated that in order for a bad acts motion to be granted: (1) the incident must be relevant to the crime charged; (2) the act must be proven by clear and convincing evidence; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061. 1064-65 (1997). NRS 48.045(2).

After a court finds that evidence of other crimes does not violate NRS 48.045(2), the court must then review the evidence regarding NRS 48.035. This statute requires a weighing of probative value against prejudicial effect. Tucker v. State, 82 Nev. 127 (1966). In Tucker the Nevada Supreme Court stated how the balancing of "probative vs. prejudicial" is to occur, 8 Nev. at 130:

> The reception of such evidence is justified by necessity and, if other evidence has substantially established the element of the crime involved (motive, intent, identity, absence of mistake, etc.), the probative value of showing another offense is diminished, and the trial court should rule it inadmissible even though relevant and within an exception to the rule of exclusion.

Ultimately, the decision to admit or exclude evidence lies within the discretion of the court. And such a decision will not be reversed absent manifest error. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992); Halbower v. State, 93 Nev. 212, 562 P.2d 485 (1977). The decision to admit or exclude evidence of separate and independent offenses rests within the sound discretion of the trial court and will not be disturbed unless it is manifestly wrong. Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983).

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A. MOTIVE, STATE OF MIND, INTENT, AND LACK OF MISTAKE OR ACCIDENT

Evidence relevant to prove motive will often overlap to a degree with "propensity evidence". As such, the question should be, is it "simple propensity evidence" (i.e. character evidence) or is it a "separate act of pedophilia or other form of sexual aberration" and therefore admissible for the other purpose of explaining why a crime of sexual deviance was committed." See Ledbetter v. State, 122 Nev. 252 at 261-62, 129 P.3d 671 at 678, *Maupin, J.* concurring in part and dissenting in part.

The Nevada Courts have recognized the value of evidence of other crimes and have upheld its admissibility in sex cases. In McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978), the defendant appealed his conviction for the crime of Infamous Crime Against Nature. The trial court allowed the State, in its case in chief, to present evidence that the defendant and his thirteen-year-old victim had engaged in oral copulation both prior and after the incident leading to the defendant's arrest. The Supreme Court upheld the trial court's admission of the testimony to prove intent or the absence of mistake or accident.

While in McMichael, *supra*, only the named victim testified, in Findley v. State, 94 Nev. 212, 577 P.2d 867 (1978) (*overruled on other grounds by* Braunstein v. State, 40 P.3d 413 (2000)), the Supreme Court of Nevada affirmed the introduction of evidence that the defendant had committed similar acts of lewdness with a child nine years earlier in order to prove the defendant's lewd intent in touching a five year old girl's "private parts" in the case for which he was on trial. The Court stated: "Intent, by reason of the words of the [lewdness with a minor] statute, is an element of the crime and directly placed in issue by the not guilty plea of the accused." Id. at Nev. 214, P.2d 868, *citing* Overton v. State, 78 Nev. 198 (1962).

In Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979), the complaining victim testified that she met the defendant while discussing a possible job as his secretary. The defendant remained even though asked to leave by the victim. The defendant offered $5,000.00 for a "one-night stand." After the victim refused, the defendant stated that he had a black belt in karate and demonstrated what he could do to her. The sexual assault then occurred. The

defendant testified that sexual intercourse occurred, but it was consensual. The State offered two prior victims (from crimes occurring nineteen months before the crime charged) who testified that they met the defendant through a job interview and were coerced into having sexual intercourse after the defendant demonstrated his ability with karate.

In allowing the evidence of the prior sexual assaults, the Nevada Supreme Court stated:

> In the instant case, evidence of Williams' sexual misconduct with other persons was admitted as being relevant ***to prove his intent to have intercourse with the victim without her consent.*** This evidence was introduced after Williams admitted to committing the act but claimed to have done so with the victim's consent. By acknowledging the commission of the act but asserting his innocent intent by claiming consent as a defense, Williams himself placed in issue a necessary element of the offense and it was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut Williams' testimony on a point material to the establishment of his guilty.

Id., 95 Nev. at 833 (emphasis added).

In Colley v. State, 98 Nev. 14 (1982), the defendant was convicted of attempted murder and battery with intent to commit sexual assault resulting in substantial bodily harm. During the trial, the State offered the testimony of a witness who had been strangled and raped by the defendant eight days before the victim in the case was attacked. Id., at 14. The defendant argued on appeal that the evidence should have been excluded. The Nevada Supreme Court affirmed the lower court ruling, finding in part that the evidence was properly admitted as relevant to the defendant's state of mind. Id. (citing Findley v. State, 94 Nev. 212 (1978), *overruled on other grounds* by Braunstein v. State, 40 P.3d 413 (2000)).

In discussing motive, the Ledbetter Court stated:

> In recent years this court has discussed at some length the motive exception of NRS 48.045(2) as a basis to admit evidence of uncharged prior acts in child abuse prosecutions. In 2002, this court's en banc decision in Braunstein v. State rejected a line of cases that stood for the proposition that evidence of other acts offered to prove "a specific emotional propensity for sexual aberration" is always relevant to a defendant's intent and outweighs the danger of unfair prejudice as a matter of law. 118 Nev. at 75, 40 P.3d at 418 (*abrogating* McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978), and overruling Findley v. State, 94 Nev. 212, 577 P.2d 867 (1978)).

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> This court returned in Braunstein to the principle of analyzing the admissibility of prior act evidence "according to the parameters of NRS 48.045(2)," which involved satisfying the three factors for admissibility. Id.

Id., 122 Nev. 252 at 261, 129 P.3d 671 at 678.

In so ruling, the Court did not say "a specific, emotional propensity for sexual aberration" is not relevant or that it is unfairly prejudicial. It was clearly the "always" relevant and "always outweighs" danger of unfair prejudice as a matter of law aspect with which the Braunstein Court took issue.

The Court went on to state:

> Later that year, this court en banc attempted to apply Braunstein in the case Richmond v. State and divided on when the motive exception of NRS 48.045(2) may be relied upon to admit prior act evidence in child abuse prosecutions. Richmond, 118 Nev. 924, 59 P.3d 1249. Three opinions resulted, but a four-justice majority of this court agreed that motive could be a valid basis for admission of prior act evidence in child abuse prosecutions to show a defendant's attraction to or obsession with his victims. Id. at 937, 59 P.3d at 1257–58 (Maupin, J., concurring in part and dissenting in part); id. at 942, 59 P.3d at 1261 (Shearing, J., concurring in part and dissenting in part, with whom Young, C.J., and Agosti, J., agreed). But *cf.* id. at 932–34, 59 P.3d at 1254–56 (plurality opinion by Rose, J., with whom Becker and Leavitt, JJ., agreed). It was explained:
>
> > Evidence of separate acts of pedophilia or other forms of sexual aberration are not character evidence, but are admissible for the "other purpose" [under NRS 48.045(2)] of explaining why a crime of sexual deviance was committed. The mental aberration that leads a person to commit a sexual assault upon a minor child, while not providing a legal excuse to criminal liability, does explain why the event was perpetrated. Id. at 939 n. 14, 59 P.3d at 1259 n. 14 (Maupin, J., concurring in part and dissenting in part).

Id. at 261-62, 678 (emphasis added).

Finally, the Ledbetter Court found that, "The probative value of explaining to the jury what motivated Ledbetter, an adult man who was in a position to care for and protect his young stepdaughter L.R. from harm, to instead repeatedly sexually abuse her for so many years was ***very high***." Id. at 262-63, 679 (emphasis added).

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Additionally, in Bigpond v. State, 128 Nev. Adv. Op. 10, 270 P.3d 1244 (2012), the Nevada Supreme Court affirmed the District Court's decision to admit evidence of prior acts of domestic violence pursuant to NRS 48.045(2). In upholding the trial court's decision, the Court specifically acknowledged that evidence may be admitted pursuant to NRS 48.045 for reasons other than those delineated in the statute. Additionally, the Court found that the evidence was admissible because they provided context to the relationship between the victim and Defendant and the victim's possible reasons for recanting her testimony.

In the instant case, the defense will undoubtedly be one of consent. DNA found on the victim precludes any other possible defense, as well as the pictures from the Wendy's Drive-Through. The Defendant engaging in a similar act of a violent sexual nature shows his motive, state of mind, and intent. See Ledbetter v. State, 122 Nev. 252, 262, 129 P.3d 671, 678 (2006), noting that "whatever might motivate one to commit a criminal act is legally admissible to prove motive under NRS 48.045(2)." In both sexual assaults, Defendant penetrated each victim orally, ejaculated into their mouths and onto their clothes, and then abandoned them in a remote area. These acts were sufficiently similar. Evidence that Defendant sexually assaulted Annie Miller is relevant, admissible, and more probative than prejudicial, and will dispel any attempt by Defendant to suggest that the instant charges are mistake or accident.

This Defendant is a dangerous sexual predator who sexually assaulted two adult female victims in a violent fashion and killed one of them afterwards. It is the State's position that the evidence of other sexual abuse should be deemed admissible at the trial as evidence of motive, state of mind, intent, and lack of mistake or accident as it relates to this matter pursuant to the Nevada Supreme Court's interpretation of NRS 48.045(2).

B. THE PROBATIVE VALUE OF THE EVIDENCE IS NOT SUBSTANTIALLY OUTWEIGHED BY THE RISK OF UNFAIR PREJUDICE

In this case the jury will hear that the victim willingly got into the car with the Defendant, and Defendant also bought her food before the sexual assault occurred. These facts, in a vacuum, might lend to a defense of consent to the sexual assault. See e.g. State v. Robinson, 431 N.W.2d 165, 173 (Wis. 1988) ("[R]ape mythology persists, and recent studies

reveal that rape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims."); Veronique N. Valliere, Understanding the Non-Stranger Rapist, 1 The Voice, Nat'l District Attorneys Ass'n Newsletter, 4 (2007), available at http://www.ndaa.org/pdf/the_voice_vol_1_no_11_2007.pdf (last visited February 19, 2018) ("Another powerful tool [sex] offenders use to groom and manipulate their audience is to be nice.

A 'nice' offender does not fit society's image of a rapist...Most non-stranger rapists use their social skills to gain control of and cooperation from the victim with little effort ... Nice comes through to juries and judges, as well as to the victim. Offenders often produce character witnesses to testify that they are good citizens/fathers/workers/church members. The defendant is counting on society to perpetrate the belief that niceness cannot coexist with violence, evil or deviance; consequently, the 'nice' guy must not be guilty of the alleged offense.")

In addition to being critically relevant to the central disputed issues in this case, the probative value of Defendant's other criminal conduct is not substantially outweighed by the potential for unfair prejudice. "The prejudice which exclusion of evidence under [California's statutory analog] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." People v. Zapien, 4 Cal.4th 929, 958, 846 P.2d 704, 718 (Cal.) (citations and internal quotation marks omitted), cert. denied 510 U.S. 919, 114 S.Ct. 315 (1993); cf. also 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE, § 404.21[3][b] (Joseph M. McLaughlin, ed., 2d ed. 2002) ("[u]nfair prejudice under Rule 403 does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence.")

Moreover, any potential for unfair prejudice will be counteracted by the Court's limiting instruction to the jury that their determination of Defendant's guilt must not be based solely upon his character. See Chavez v. State, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (limiting instruction cured any unfair prejudice associated with the introduction of bad act evidence); U.S. v. Strong, 485 F.3d 985, 991 (7th Cir.) ("We consistently have explained that

such [limiting] instructions minimize the prejudicial effect of this type of [other bad act] evidence." (citations omitted)), cert. denied, Strong v. U.S., 552 U.S. 936, 128 S.Ct. 336 (2007); U.S. v. Davis, 707 F.2d 880, 884 (6th Cir. 1983) (explaining that although "the chance of prejudice is always present in a 404(b) situation" the district court may reduce that chance "by giving the jury a limiting instruction informing them" of the proper use of the other bad acts evidence).

Likewise, federal appellate courts have frequently approved the admission of other bad acts in contexts posing an equal or greater risk of unfair prejudice. See, e.g., U.S. v. Cooper, 433 Fed.Appx. 875, 877-878 (11th Cir. 2011) (in prosecution for child pornography possession, probative value of defendant's prior conviction for child molestation in terms of defendant's intent, knowledge, and absence of mistake in downloading material not substantially outweighed by potential for unfair prejudice); U.S. v. Clark, 668 F.3d 568, 575 (8th Cir. 2012) (potential for unfair prejudice in identity theft prosecution did not substantially outweigh probative value of defendant's prior identity theft conviction; evidence was probative of defendant's intent, knowledge, and absence of mistake concerning his knowledge that he was using the means of identification of an actual person, and district court reduced any potential for unfair prejudice by giving an appropriate limiting instruction); U.S. v. McCarson, 527 F.3d 170, 173-174 (D.C. Cir. 2008) (probative value of defendant's prior convictions for gun possession and cocaine distribution not substantially outweighed by danger of unfair prejudice in prosecution for ex-felon in possession of firearm and possessing cocaine base with intent to distribute; prior convictions highly probative of defendant's intent to distribute crack cocaine and his constructive possession of gun and crack cocaine, and district court instructed that evidence could be considered as to intent and knowledge); U.S. v. Hernandez-Guevara, 162 F.3d 863 (5th Cir. 1998) (in prosecution for smuggling undocumented aliens, defendant's two prior convictions for alien smuggling relevant to intent, knowledge, absence of mistake and not substantially outweighed by potential for unfair prejudice), cert. denied, Hernandez-Guevara v. U.S., 526 U.S. 1059, 119 S.Ct. 1375 (1999).

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Admission of Defendant's other criminal conduct bears no more risk of prejudice than the situations in the foregoing cited cases, and its highly probative content is certainly not substantially outweighed by the risk of *unfair* prejudice in the instant case. This evidence is highly probative of Defendant's sexual assault against the victim and is no more prejudicial than the crimes he is charged with. As such, this prejudice is not sufficient to substantially outweigh the probative value of such evidence, and it should be admitted pursuant to 48.045(2).

C. REMOTENESS HAS NO SUBSTANTIVE EFFECT ON THE PROBATIVE VALUE OF THE PRIOR SEXUAL OFFENSES

The defense may attempt to argue that the prior sexual offense is too remote in time and thus should be excluded. Such an argument fails to substantively address the highly probative value of this evidence.

California and the federal courts support the State's position. The ground breaking California case of People v. Soto found admissible prior sexual offenses that were committed by the then 45 year old defendant, Soto, when he was 15 or 16 years of age.[1] Soto was on trial for offenses committed in 1996, the prior sexual offenses admitted against him started to occur in 1969.[2] Thus 27 years had passed between the beginning of the admitted prior sexual offenses and the occurrence of the acts for which Soto was convicted.

In resolving this issue, the California court cited to federal precedent noting it in the *Soto* opinion as follows:

> In light of these concerns, the introduction of evidence pursuant to rules 413 through 415[3] must be evaluated on a case-by-case basis to determine whether the significance of the prior acts has become too attenuated and whether the memories of the witnesses have likely become too [***51] frail. (*U.S. v. Larson*, supra, 112 F.3d 600, 605.) "The legislative history of Rule 414 reveals that Congress meant its temporal scope to be broad, **allowing the court to admit evidence** of Rule 414 acts **that occurred more than 20 years before trial . . . .**" (*Ibid.*) According to the legislative history: " '**No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by**

[1] *People v. Soto*, 64 Cal. App. 4th 966, 75 Cal. Rptr. 2d 605(1998).
[2] *Id.*
[3] Federal rules of evidence dealing with the admission of prior sexual offenses.

> **the defendant is often probative and properly admitted, notwithstanding substantial lapses of time in relation to the charged offense or offenses.'** [Citations.]" (Ibid.)

People v. Soto, 64 Cal. App. 4th 966, 990(1998)(emphasis added).

Despite the 19 years that have passed since Soto, California continues to uphold its precepts. In 2014, California upheld the admission of 30-year-old sexual offenses committed by McCurdy when he was 10 years old. People v. McCurdy, 59 Cal. 4th 1063, 1099, 331 P.3d 265, 294(2014); *see also* People v. Robertson, 208 Cal.App.4th 965, 992–994, 146 Cal. Rptr. 3d 66(2012) (upholding admission of sex crime that was committed 30 years before the charged crime); People v. Branch, 91 Cal.App.4th 274, 284–285, 109 Cal. Rptr. 2d 870(2001) (same); People v. Waples, 79 Cal.App.4th 1389, 1392–1395, 95 Cal. Rptr. 2d 45(2000) (continuous molestation occurring between 18 to 25 years before the charged crimes); Thus, at most, the passage of time *may affect the weight* of the evidence but has no bearing on its admissibility.

Here, the evidence of sexual offenses committed by Defendant upon Annie Miller is not too remote and should be admitted at Defendant's trial pursuant to NRS 48.045. Such evidence of prior sexual conduct is highly probative and is admissible as propensity evidence. However, as discussed, *infra*, this is not the only basis for the admissibility of Defendant's prior sexual offenses. The legislature has made it clear that sexually related offenses are not subject to the same analysis as other bad acts.

The evidence the State is seeking to admit is relevant, it is proven by clear and convincing evidence, *i.e.* Defendant's DNA found on Annie Miller's body, and it's probative value is not substantially outweighed by the danger of unfair prejudice pursuant to Ledbetter above and the Tinch case referenced herein. Finally, as is always the case, evidence that is probative to the State's case is inherently going to be prejudicial to the defense case, and Nevada law only prohibits admitting evidence where there is *unfair* prejudice.

Lastly, if such evidence is admitted only for the narrow purposes described in this subsection, and not for propensity purposes as described above, the Court may ensure that this evidence is considered by the jury only for the proper purposes for which it would be admitted

by offering a limiting instruction to the jury both at the time the evidence is presented and during closing instructions. Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001). Such a limiting instruction will reduce the risk of any unfair prejudice to Defendant or confusion of issues to the jury members. As such, the State contends any prejudicial effect of this evidence does not substantially outweigh its probative value, and thus, the evidence should be admitted for at least these limited purposes.

D. DEFENDANT'S OTHER ACTS WILL BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE OUTSIDE THE PRESENCE BEFORE THE STATE SEEKS ADMISSION BEFORE THE JURY

Prior to the admission of evidence of other bad acts, the State must show, by plain, clear, and convincing evidence that Defendant committed the offenses. Tinch, 113 Nev. at 1176, 946 P.2d at 1064-1065; Tucker v. State, 82 Nev. 127, 131, 412 P.2d 970, 972 (1966). The Nevada Supreme Court has specifically approved the procedure of holding a hearing outside the presence of the jury in which the State must present its reasons why the other offense is admissible under NRS 48.045(2) and apprising the trial judge of the quantum and quality of its evidence proving that the defendant committed the other offense. Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 508 (1985). Under Petrocelli, clear and convincing proof of collateral acts may be established by an offer of proof outside the presence of the jury combined with quality of evidence presented to the jury. Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998).

In Salgado, Salgado claimed that it was error for the Court to admit bad act evidence when the State made only an offer of proof of the evidence, rather than presenting witness testimony. Salgado's challenge was "solely to the failure of the prosecution to put a witness on the stand outside the presence of the jury to establish clear and convincing proof of the prior acts." Id. at 1042. The Court, citing Petrocelli, held that there was no error and the bad act evidence was properly admitted at trial. Id. at 1043.

> In Petrocelli, "the state *apprised* the trial judge of the quantum and quality of its evidence proving that the defendant had committed the prior offense." Petrocelli, 101 Nev. at 52, 692 P.2d at 507 (emphasis in original). We concluded that this procedure "was correct." Id. at 52, 692 P.2d at 508.

> Before evidence of a prior bad act can be admitted, the state must show, by plain, clear, and convincing evidence that the defendant committed the offense. The state's *offer of proof* fulfilled this requirement. Petrocelli's own admission, coupled with eyewitness testimony, established by the requisite standard of proof that Petrocelli killed Melanie Barber. Moreover, the state properly demonstrated the *quality of its evidence on the subject by calling the eyewitness on rebuttal. Id.* (emphasis in original).
>
> Thus, under Petrocelli, clear and convincing proof of collateral acts can be established by an offer of proof outside the presence of the jury combined with the quality of the evidence presented to the jury.

Salgado, 114 Nev. at 1043. Indeed, in Petrocelli, there was no "live-witness" testimony prior to the collateral act evidence being admitted at trial. The State sought to admit bad act evidence of another murder after Petrocelli testified in his defense. 101 Nev. 46, 51 (1985). After Petrocelli's direct examination, the State appropriately requested the Court's permission to raise the collateral offense issue via a hearing outside the presence of the jury. Id. During the hearing, the State presented its reasons why the collateral offense was admissible pursuant to NRS 48.045, apprised the Court of the quantum and quality of its evidence proving that defendant committed the prior offense, and the Court weighed the probative value of the evidence against its prejudicial effect. Id. The Supreme Court held that this procedure was correct. Id. The holding established in Petrocelli should be applied to this case.

CONCLUSION

Based upon the foregoing, the State requests this Court grant the State's Motion to Admit Evidence of Other Crimes, Wrongs or Acts Pursuant to NRS 48.045(3), NRS 48.061, NRS 48.045(2).

DATED this 7th day of July, 2021.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Lindsey Moors*
LINDSEY MOORS
Chief Deputy District Attorney
Nevada Bar #012232

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made through electronic efile and served this 7th day of JULY, 2021, to:

KATHLEEN HAMERS, DPD
hamerskm@ClarkCountyNV.gov

BY */s/ Howard Conrad*
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **July 19, 2021**

C-16-319756-1 State of Nevada
vs
Brandon Mcguire

July 19, 2021 **8:30 AM** **All Pending Motions**

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES PRESENT:

Brouwers, Shana S.	Attorney
Hamers, Kathleen M.	Attorney
Mcguire, Brandon Alexander	Defendant
Moors, Lindsey	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- STATE'S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS PURSUANT TO NRS 48.045 (3), NRS 48.061 AND NRS 48.045(2)...CALENDAR CALL

Arguments by counsel. COURT stated its FINDINGS and ORDERED, motion DENIED. Ms. Hamers to prepare the order. Ms. Moors objected to Deft's Notice of Expert Witness as it was not timely filed. Ms. Hamers argued they filed the Notice on the next buisness day after a holiday. Colloquy regarding the State's video. Court NOTED it would allow the Deft's Notice for Expert Witness. Parties announced ready for trial with 8-10 witness and 4-5 days to try. Ms. Moors advised Nima Afshar would be co-counsel. COURT FURTHER ORDERED, status check and central calendar call SET.

CUSTODY

7/21/21 8:30 AM - STATUS CHECK: TRIAL

7/21/21 2:00 PM - CENTRAL CALENDAR CALL (LLA)

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MONICA TRUJILLO, DISTRICT JUDGE, Respondents, and BRANDON ALEXANDER MCGUIRE, Real Party in Interest.	)	Case No. 83269

REAL PARTY IN INTEREST'S APPENDIX TO MOTION TO DISQUALIFY JUSTICE HERNDON

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of ~~July~~ August, 2021. Electronic Service

of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

KATHLEEN M. HAMERS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

MONICA TRUJILLO
District Court, Department III
200 Lewis Avenue
Las Vegas, NV 89101

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