

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 04 2021 02:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SAMUEL CRAIG MCDONALD,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: C-18-334954-1

Docket No: 83193

RECORD ON APPEAL VOLUME 1

ATTORNEY FOR APPELLANT
SAMUEL MCDONALD # 89628,
PROPER PERSON
P.O. BOX 208
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

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C-18-334954-1

State of Nevada
vs
Samuel McDonald

I N D E X

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ORIGINAL

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

DISTRICT COURT
CLARK COUNTY, NEVADA

SEP 19 2018

BY, 
KIMBERLY ESTALA, DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL MCDONALD, aka,
Samuel Craig McDonald
ID#1753770

Defendant.

CASE NO: C-18-334954-1

DEPT NO: X

WARRANT FOR ARREST

INDICTMENT WARRANT

THE STATE OF NEVADA,

To: Any Sheriff, Constable, Marshall, Policeman, or Peace Officer in This State:

An Indictment having been found on the 19th day of September, 2018, in the above entitled Court, charging Defendant SAMUEL MCDONALD, aka, Samuel Craig McDonald, above named, with the crime(s) of: (2) CTS - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony - NRS 200.364, 200.366 - NOC 50105).

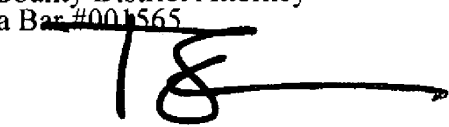
YOU ARE, THEREFORE, COMMANDED forthwith to arrest and bring said Defendant before the Court to answer the Indictment. If the Court is not in session, you are to deliver Defendant into the custody of the Sheriff of Clark County, or if requested by Defendant, take Defendant before any Magistrate in the County where arrested that bail may be given to answer to the Indictment. Defendant shall be admitted to bail in the sum of \$ 300,000⁰⁰.


I HEREBY AUTHORIZE THE SERVICE OF THE WITHIN WARRANT BY TELETYPE, PURSUANT TO NRS 171.148. The Warrant may be served at any hour day or night.

GIVEN under my hand this 19th day of September, 2018.

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

BY


JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #11732


DISTRICT JUDGE
LINDA BELL
BAIL \$ 300,000⁰⁰

DA# 18AGJ050X/18F07303X/cl
LVMPD EV#0112280052
02/09/1959; BMA; 556-94-6681;
(TK3)

C-18-334954-1
IND
Indictment
4780729



RET
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #11732
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

SAMUEL MCDONALD, aka,
Samuel Craig McDonald,
ID#1753770

Defendant.

CASE NO: C-18-334954-1
DEPT NO: X

INDICTMENT WARRANT RETURN

An Indictment having heretofore been found on the 19th day of September, 2018, in the above entitled Court, charging Defendant SAMUEL MCDONALD, aka, Samuel Craig McDonald, above named, with the crime(s) of: (2) CTS - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony - NRS 200.364, 200.366 - NOC 50105), and upon finding the said Indictment, the court issued a warrant for the arrest of said Defendant.

I hereby certify that I received a certified copy of the Indictment Warrant and served the same by arresting the within Defendant on the ____ day of _____ 2018.

JOSEPH LOMBARDO
Sheriff, Clark County, Nevada

BY:

Deputy

ORIGINAL

1 IND

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JACOB VILLANI
6 Chief Deputy District Attorney
7 Nevada Bar #11732
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

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

SEP 19 2018

BY 
KIMBERLY ESTALA, DEPUTY

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

CASE NO: C-18-334954-1

11 -vs-

DEPT NO: X

12 SAMUEL MCDONALD, aka,
13 Samuel Craig McDonald, #1753770

14 Defendant.

INDICTMENT

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss.

17 The Defendant above named, SAMUEL MCDONALD, aka, Samuel Craig McDonald,
18 accused by the Clark County Grand Jury of the crime(s) of SEXUAL ASSAULT WITH A
19 MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony - NRS 200.364,
20 200.366 - NOC 50105), committed at and within the County of Clark, State of Nevada, on or
21 about the 28th day of December, 2001, as follows:

22 COUNT 1

23 did then and there willfully, unlawfully, and feloniously sexually assault and subject
24 S.B., a child under fourteen years of age, to sexual penetration, to wit: fellatio: by placing his
25 penis on or in the mouth of S.B., against his or her will, or under conditions in which Defendant
26 knew, or should have known, that S.B. was mentally or physically incapable of resisting or
27 understanding the nature of Defendant's conduct.

28 //

C-18-334954-1
IND
Indictment
4780730



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1 COUNT 2

2 did then and there willfully, unlawfully, and feloniously sexually assault and subject
3 S.B., a child under fourteen years of age, to sexual penetration, to wit: anal intercourse: by
4 placing his penis into the anal opening of the said S.B., against his or her will, or under
5 conditions in which Defendant knew, or should have known, that S.B. was mentally or
6 physically incapable of resisting or understanding the nature of Defendant's conduct.

7 DATED this 5th day of September, 2018.

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

10
11 BY


12 JACOB VILLANI
13 Chief Deputy District Attorney
14 Nevada Bar #11732

15
16 ENDORSEMENT: A True Bill

17
18 
19 Foreperson, Clark County Grand Jury

1 Names of Witnesses and testifying before the Grand Jury:

2 S.B. – c/o CCDA, 200 Lewis Avenue, LV, NV 89101

3

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

5 CUSTODIAN OF RECORDS - CCDC

6 CUSTODIAN OF RECORDS - LVMPD COMMUNICATIONS

7 CUSTODIAN OF RECORDS - LVMPD RECORDS

8 TOOLEY, SHANNON – LVMPD #6224

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27 18AGJ050X/18F07303X/cl-GJ

28 LVMPD EV# 0112280052

(TK3)



OPI
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL MCDONALD,
#1753770

Defendant.

CASE NO: **C-18-334954-1**

DEPT NO: **X**

**ORDER FOR PRODUCTION OF INMATE
SAMUEL MCDONALD, BAC #89628**

DATE OF HEARING: 10-10-2018
TIME OF HEARING: 8:30 A.M.

TO: JO GENTRY, Warden of the Southern Desert Correctional Center;

TO: JOSEPH LOMBARDO, Sheriff of Clark County, Nevada

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, Clark County District Attorney, through JACOB VILLANI, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that JO GENTRY, Warden of the Southern Desert Correctional Center shall be, and is, hereby directed to produce SAMUEL MCDONALD, in Case Number C-18-334954-1, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said SAMUEL MCDONALD is currently incarcerated in the Southern Desert Correctional Center located in Indian Springs, Nevada and his presence will be required in Las

1 Vegas, Nevada commencing on 10-10-2018, at the hour of 8:30 o'clock A.M. and continuing
2 until completion of the prosecution's case against the said Defendant.


3 IT IS FURTHER ORDERED that JOSEPH LOMBARDO, Sheriff of Clark County,
4 Nevada, shall accept and retain custody of the said SAMUEL MCDONALD in the Clark
5 County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark
6 County, or until the further Order of this Court; or in the alternative shall make all
7 arrangements for the transportation of the said SAMUEL MCDONALD to and from the
8 Nevada State Prison facility which are necessary to insure the SAMUEL MCDONALD's
9 appearance in Clark County pending completion of said matter, or until further Order of this
10 Court.

11 DATED this 20 day of September, 2018.

12
13 
14 DISTRICT JUDGE

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

17
18 BY


19 JACOB VILLANI
Chief Deputy District Attorney
20 Nevada Bar #11732

21
22
23
24
25
26
27
28 jg/SVU

Alvin B. Hanson

CLARK COUNTY, NEVADA

DISTRICT COURT

Plaintiff,

vs.

SAMUEL MCDONALD, Samuel Craig McDonald,

Defendant.

) GJ Case No. 18AGJ050X

) DC Case No. C334954

Taken at Las Vegas, Nevada

Tuesday, September 18, 2018

9:54 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reported by: Donna J. McCord, C.C.R. No. 337

1 GRAND JURORS PRESENT ON SEPTEMBER 18, 2018:

2

3 RUSSELL WALKER, Foreperson,

4 CAROLYN JORDAN, Deputy Foreperson

5 RACHEL TABRON, Secretary

6 MICHELE CRINE, Assistant Secretary

7 JOHN ASSELIN

8 KATHY COX

9 THERESA GAISSER

10 DAWN HERSHEY

11 MICHAEL HOLLINGSWORTH

12 ADRIANA IONESCU

13 CHRISTOPHER KERCEL

14 SHARON KLINCK

15 JAMES MCGREGOR

16 MARYLEE WHALEN

17

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22 Also present at the request of the Grand Jury:

23 Jacob Villani

24 Chief Deputy District Attorney

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INDEX OF WITNESSES

EXAMINED

SHAWN BRYANT

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5

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6

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7

1 LAS VEGAS, NEVADA, SEPTEMBER 18, 2018

2 * * * * *

3
4 DONNA J. McCORD,

5 having been first duly sworn to faithfully
6 and accurately transcribe the following
7 proceedings to the best of her ability.
8

9 THE FOREPERSON: Let the record reflect
10 that I have canvassed the waiting area and no one has
11 appeared in response to Notice of Intent to Seek
12 Indictment.

13 MR. VILLANI: Good morning, ladies and
14 gentlemen of the Grand Jury. My name is Jake Villani.
15 I will be presenting Grand Jury case number 18AGJ050X,
16 State of Nevada versus Samuel McDonald. The record will
17 reflect that I've marked a copy of the proposed
18 Indictment as Exhibit Number 1 and that all members of
19 the Grand Jury have a copy of it.

20 The defendant in this case is charged with
21 the crime of sexual assault with a minor under 14 years
22 of age committed at and within the County of Clark,
23 State of Nevada, on or about the 28th day of December,
24 2001.

25 I'm required by law to advise you of the

1 elements of this charge. I've provided written
2 instructions to each of the Grand Jurors as the statute
3 was in 2001 and marked a copy of the instructions as
4 proposed Exhibit Number 2.

5 My first witness is Shawn Bryant.

6 THE FOREPERSON: Please raise your right
7 hand.

8 You do solemnly swear that the testimony
9 that you're about to give upon the investigation now
10 pending before this Grand Jury shall be the truth, the
11 whole truth, and nothing but the truth, so help you God?

12 THE WITNESS: Yes.

13 THE FOREPERSON: You may be seated.

14 You are advised that you are here today to
15 give testimony in the investigation pertaining to the
16 offense of sexual assault with a minor under 14 years of
17 age involving Samuel McDonald.

18 Do you understand this advisement?

19 THE WITNESS: Yes.

20 THE FOREPERSON: Please state your first
21 and last name and spell them for the record.

22 THE WITNESS: Shawn Bryant, S-H-A-W-N
23 B-R-Y-A-N-T.

24 MR. VILLANI: May I proceed,
25 Mr. Foreperson?

1 THE FOREPERSON: You may.

2

3 **SHAWN BRYANT,**

4 having been first duly sworn by the Foreperson of the
5 Grand Jury to testify to the truth, the whole truth
6 and nothing but the truth, testified as follows:

7

8 **EXAMINATION**

9 BY MR. VILLANI:

10 Q Shawn, what's your date of birth?

11 A 9-3-92.

12 Q Do you know a man by the name of Samuel
13 McDonald?

14 A Yes.

15 Q How do you know him?

16 A He was dating my sister in 2001.

17 Q Showing you what's been marked as Grand
18 Jury Exhibit Number 3, do you recognize the person
19 depicted in that photograph?

20 A Yes.

21 Q Who is that?

22 A Sam McDonald.

23 Q Okay. Now, you gave an interview with
24 police regarding this case, correct?

25 A Yes.

1 Q Do you recall referring to Mr. McDonald as
2 Mr. Cook during that interview?

3 A Yes.

4 Q Why was that?

5 A Because I didn't know his last name.

6 Q Okay. But the person depicted in that
7 photograph is the person we're talking about as Samuel
8 McDonald, your sister's boyfriend, correct?

9 A Yes.

10 Q Okay. On or about December 28th of 2001,
11 how old were you?

12 A About nine.

13 Q Were you staying with Samuel McDonald at
14 that time?

15 A Yes.

16 Q Where were you staying?

17 A It was located in Las Vegas, Nevada, on I
18 want to say next to UMC.

19 Q Okay. So near UMC here in Clark County?

20 A Yes.

21 Q Why were you staying with him at that time?

22 A Because in California my mom had like a
23 foster case going, and instead of us getting taken my
24 sister opened her doors for us to come to her house.

25 Q On or about December 28th of 2001, did

1 Samuel McDonald have inappropriate contact with you?

2 A Yes.

3 Q What are you able to tell us about what
4 happened that day?

5 A I was about nine and he did like
6 penetration, oral sex and stuff like that. I can't --
7 well, it's hard to talk about, I'm sorry.

8 Q That's fine. So you said he did
9 penetration, oral sex, stuff like that. On that date
10 were you alone with him?

11 A Yes.

12 Q Okay. Where did this occur?

13 A Inside the house.

14 Q Now, you said he did oral sex. Do you mean
15 that he put your penis inside his mouth?

16 A He put his penis inside my mouth.

17 Q He put his penis inside your mouth?

18 A Yes.

19 Q Okay. Now, you said he did penetration.
20 Where did he penetrate you?

21 A Anal.

22 Q Do you know if he ejaculated or not?

23 A Yes.

24 Q And how do you know that?

25 A Well, back then it looked like spit but now

1 that I'm older I understand. I have two kids so --

2 Q So now as an adult you're aware of what
3 occurred?

4 A Yes.

5 Q About how long did this take, do you
6 remember?

7 A Anywhere from like 15 to 20 minutes.

8 Q Okay. How did this get reported to the
9 police?

10 A My mother came back and I explained to her
11 what was going on and she went straight to UMC.

12 Q Do you recall going to UMC?

13 A Yes.

14 Q Do you recall having a sexual assault kit
15 taken?

16 A Yes.

17 Q Did they take swabs of you?

18 A Yes.

19 Q After you went to UMC and got the sexual
20 assault kit, what do you remember about this case?

21 A I just remember after they said that he was
22 going to be incarcerated a couple years. After I left
23 Nevada I ended up going to New York so I don't get -- so
24 me and my sister didn't get taken to foster care. And
25 from what my family had told me, they said that he did

1 it to another little girl and got 30 years. And I just
2 thought my case went cold and I didn't know nothing
3 about it because they wouldn't -- that was the only
4 thing they had me is they let -- stay off of is just he
5 went to jail so --

6 Q Not that it's your job or anything, but did
7 you do anything to follow up as far as call the police
8 or anything like that?

9 A For him to go to jail because of the little
10 girl or my situation?

11 Q No, your situation.

12 A My mother did it, I didn't. You know, I
13 mean, I'm a kid, I don't -- I don't know if that was the
14 right thing but he knew but I didn't.

15 MR. VILLANI: And ladies and gentlemen, I'm
16 going to instruct you to ignore the allegation that he
17 did this to another girl and that he went to prison for
18 that. That has nothing to do with this particular case.

19 THE WITNESS: Yeah.

20 MR. VILLANI: I'm just offering it for why
21 he felt the case had been handled appropriately.

22 BY MR. VILLANI:

23 Q When's the next time you were contacted
24 regarding your case?

25 A November of 2017.

1 Q Okay. All right.

2 That concludes my questioning of this
3 witness. Are there any questions from the Grand Jurors?
4 Seeing no hands.

5 THE FOREPERSON: By law these proceedings
6 are secret and you are prohibited from disclosing to
7 anyone anything that transpired before us including any
8 evidence presented to the Grand Jury, any event
9 occurring or a statement made in the presence of the
10 Grand Jury or any information obtained by the Grand
11 Jury.

12 Failure to comply with this admonition is a
13 gross misdemeanor punishable up to 364 days in the Clark
14 County Detention Center and a \$2,000 fine. In addition
15 you may be held in contempt of court punishable by an
16 additional \$500 fine and 25 days in the Clark County
17 Detention Center.

18 Do you understand this admonition?

19 THE WITNESS: Yes.

20 THE FOREPERSON: Thank you. You're
21 excused.

22 MR. VILLANI: That concludes my
23 presentation of evidence. Do any of the Grand Jurors
24 have any questions regarding the elements of the offense
25 charged? Seeing no hands this matter is submitted for

1 your deliberation.

2 (At this time, all persons, except the
3 members of the Grand Jury, exited the room at 10:02 and
4 returned at 10:03.)

5 THE FOREPERSON: Mr. District Attorney, by
6 a vote of 12 or more Grand Jurors a true bill has been
7 returned against defendant Samuel McDonald charging the
8 crimes of two counts of sexual assault with a minor
9 under 14 years of age in Grand Jury case number
10 18AGJ050X.

11 We instruct you to prepare an Indictment in
12 conformance with the proposed Indictment previously
13 submitted to us.

14 MR. VILLANI: Thank you.

15 (Proceedings concluded.)

16 --oo0oo--

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REPORTER'S CERTIFICATE

STATE OF NEVADA)
 : ss
COUNTY OF CLARK)

I, Donna J. McCord, C.C.R. 337, do hereby
certify that I took down in Shorthand (Stenotype) all of
the proceedings had in the before-entitled matter at the
time and place indicated and thereafter said shorthand
notes were transcribed at and under my direction and
supervision and that the foregoing transcript
constitutes a full, true, and accurate record of the
proceedings had.

Dated at Las Vegas, Nevada,
September 29, 2018.

/S/DONNA J. MCCORD
Donna J. McCord, CCR 337

1 AFFIRMATION

2 Pursuant to NRS 239B.030

3
4 The undersigned does hereby affirm that the preceding
5 TRANSCRIPT filed in GRAND JURY CASE NUMBER 18AGJ050X:
6
78 X Does not contain the social security number of any
9 person,

10 -OR-

11 ____ Contains the social security number of a person as
12 required by:13 A. A specific state or federal law, to-wit:
14 NRS 656.250.

15 -OR-

16 B. For the administration of a public program
17 or for an application for a federal or
18 state grant.19 /S/DONNA J. MCCORD
SignatureSeptember 29, 2018
Date20 Donna J. McCord
Print Name21
22 Official Court Reporter
Title
23
24
25

BY MR. VILLANI: [2] 7/8 11/21 MR. VILLANI: [6] 5/12 6/23 11/14 11/19 12/21 13/13 THE FOREPERSON: [8] 5/7 6/5 6/12 6/19 6/25 12/4 12/19 13/4 THE WITNESS: [5] 6/11 6/18 6/21 11/18 12/18 \$ \$2,000 [1] 12/14 \$500 [1] 12/16 - --oo0oo [1] 13/16 -OR [2] 15/10 15/14 / /S/DONNA [2] 14/17 15/18 1 10:02 [1] 13/3 10:03 [1] 13/4 12 [1] 13/6 14 [3] 5/21 6/16 13/9 15 [1] 10/7 18 [3] 1/15 2/1 5/1 18AGJ050X [4] 1/9 5/15 13/10 15/5 2 20 [1] 10/7 2001 [5] 5/24 6/3 7/16 8/10 8/25 2017 [1] 11/25 2018 [5] 1/15 2/1 5/1 14/15 15/18 239B.030 [1] 15/2 25 [1] 12/16 28th [3] 5/23 8/10 8/25 29 [2] 14/15 15/18 3 30 [1] 11/1 337 [3] 1/25 14/6 14/18 364 [1] 12/13 6 656.250 [1] 15/13 9 9-3-92 [1] 7/11 92 [1] 7/11 9:54 [1] 1/16 A a.m [1] 1/16 ability [1] 5/7 able [1] 9/3 about [12] 5/23 6/9 8/7 8/10 8/12 8/25 9/3 9/5 9/7 10/5 10/20 11/3 accurate [1] 14/12	accurately [1] 5/6 addition [1] 12/14 additional [1] 12/16 administration [1] 15/15 admonition [2] 12/12 12/18 ADRIANA [1] 2/12 adult [1] 10/2 advise [1] 5/25 advised [1] 6/14 advisement [1] 6/18 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1 PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
2 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
3 **PUBLIC DEFENDERS OFFICE**
309 South Third Street, Suite 226
4 Las Vegas, Nevada 89155
Telephone: (702) 455-4685
5 Facsimile: (702) 455-5112
Tegan.machnich@clarkcountynv.gov
6 *Attorneys for Defendant*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)	
)	
10 Plaintiff,	)	CASE NO. C-18-334954-1
)	
11 v.	)	DEPT. NO. X
)	
12 SAMUEL MCDONALD,)	
)	
13 Defendant,	)	DATE: November 14, 2018
	)	TIME: 8:30 a.m.

14 **PETITION FOR WRIT OF HABEAS CORPUS**

15 TO: The Honorable Judge of the Eighth Judicial District Court of
16 The State of Nevada, in and for the County of Clark

17 The Petition of SAMUEL MCDONALD submitted by Tegan C. Machnich, Chief Deputy
18 Public Defender, as attorney for the above-captioned individual, respectfully affirms:

19 1. That he/she is a duly qualified, practicing and licensed attorney in the City
20 of Las Vegas, County of Clark, State of Nevada.

21 2. That Petitioner makes application for a Writ of Habeas Corpus; that the
22 place where the Petitioner is imprisoned actually or constructively imprisoned and restrained of
23 his liberty is the Clark County Detention Center; that the officer by whom he is imprisoned and
24 restrained is the Sheriff of Clark County Nevada.

25 3. That the imprisonment and restraint of said Petitioner is unlawful in that:

26 4. That Petitioner waives his right to be brought to trial within 60 days if this
27 Writ cannot be heard and ruled upon by that time.
28

1 5. That Petitioner consents that if Petition is not decided within 15 days
2 before the date set for trial, the Court may, without notice of hearing, continue the trial
3 indefinitely to a date designated by the Court.

4 6. That Petitioner personally authorized his aforementioned attorney to
5 commence this action.

6 WHEREFORE, Petitioner prays that this Honorable Court make an order directing the
7 County of Clark to issue a Writ of Habeas Corpus directed to the said the Sheriff of Clark
8 County Nevada, commanding him to bring the Petitioner before your Honor, and return the cause
9 of his imprisonment.

10 DATED this 29th day of October, 2018.

11 PHILIP J. KOHN
12 CLARK COUNTY PUBLIC DEFENDER

13
14 By: /s/ Tegan C. Machnich
15 TEGAN C. MACHNICH, #11642
16 Chief Deputy Public Defender
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

3 COMES NOW the Petitioner, SAMUEL MCDONALD, by and through his counsel,
4 TEGAN MACHNICH, the Clark County Public Defender's Office, and submits the following
5 Points and Authorities in Support of Defendant's Petition for a pre-trial Writ of Habeas Corpus.

6 **I.**

7 **BRIEF OVERVIEW**

8 Mr. McDonald is currently charged with 2 Counts of Sexual Assault with a Minor Under
9 Fourteen Years of Age. Calendar Call is currently scheduled for December 10, 2018, and trial is
10 set to commence December 17, 2017. Mr. McDonald made his first appearance in District Court
11 to enter a plea of Not Guilty on October 10, 2018.

12 Presently, Mr. McDonald is incarcerated in the Nevada Department of Corrections
13 serving an aggregate twelve (12) years to life on a case that occurred four years after the alleged
14 offenses here. He goes before the parole board for the first time in 2023 and has been so
15 incarcerated since 2005. This was a “cold hit” case.

16 **II.**

17 **TESTIMONY OFFERED AT GRAND JURY**

18 The State called the Complainant as their only witness. After eliciting all testimony
19 regarding the alleged offenses, DDA Villani asked the following and received the following
20 answer:

21 *Q: After you went to UMC and got the sexual assault kit, what do you remember*
22 *about this case?*

23 *A: I just remember after they said that he was going to be incarcerated a couple*
24 *years. After I left Nevada I ended up going to New York so I don't get – so me and my*
25 *sister didn't get taken to foster care. And from what my family had told me, they said that*
26 *he did it to another little girl and got 30 years. And I just thought my case went cold and*
27 *I didn't know nothing about it because they wouldn't – that was the only thing they had*
28 *me is they let – stay off of is just he went to jail so—*

1 Neither the question, nor the answer, is relevant to the elements of the charged offenses in this
2 case. They serve only to elicit, and divulge, hearsay riddled bad acts. The prejudice of said bad
3 acts cannot be unheard or undone. However, taking it even further, DDA Villani continue to ask
4 similar questions:

5 *Q: Not that it's your job or anything, but did you do anything to follow up as far*
6 *as call the police or anything like that?*

7 *A: For him to go to jail because of the little girl or my situation?*

8 *Q: No, your situation.*

9 *A: My mother did it, I didn't. You know, I mean, I'm a kid, I don't – I don't know*
10 *if that was the right thing but he knew but I didn't.*

11 Only after all of this, did DDA Villani attempt to issue a sort of limiting instruction that instead
12 only highlighted the testimony:

13 *Q: And ladies and gentlemen, I'm going to instruct you to ignore the allegation*
14 *that he did this to another girl and that he went to prison for that. That has nothing to do*
15 *with this particular case.*

16 *A: Yeah.*

17 *Q: I'm just offering it for why he felt the case had been handled appropriately.*

18 [See GJT, pp 10-11.]

19 Ultimately, and not at all surprisingly, the Grand Jury returned a true bill on all charged
20 counts.

21 III.

22 LEGAL ARGUMENT

23 The Writ of Habeas Corpus is the fundamental instrument for safeguarding individual
24 freedom against arbitrary and lawless action. Its preeminent role is recognized by the admonition
25 that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended.' Harris v. Nelson, 394
26 U.S. 286, 290-91, 89 S.Ct. 1082 (1969).
27
28

1 Further, “the basic purpose of the writ is to enable those unlawfully incarcerated to obtain
2 their freedom...” **Johnson v. Avery**, 393 U.S. 483, 485; 89 S.Ct. 747 (1969). Since 1912, the
3 Nevada Supreme Court has recognized that the writ of habeas corpus is the plain, speedy and
4 adequate remedy by which to determine the legal sufficiency of the evidence supporting a grand
5 jury indictment. *See for example* **Eureka County Bank Habeas Corpus Cases**, 35 Nev. 80; 126
6 P. 655 (1912); **Ex parte Stearns**, 68 Nev. 155; 227 P.2d 971 (1951); and, **Ex parte Colton**, 72
7 Nev. 83; 295 P.2d 383 (1956).

8 In this case, and as more fully set forth below, Mr. McDonald has been unlawfully held to
9 answer to the charges in this matter due to the failure of the state to adduce sufficient legal evidence
10 to demonstrate probable cause. When bad act testimony is aggressively used to procure probable
11 cause, the very manner used to obtain the probable cause is lawless under Harris, and the integrity
12 of the process is jeopardized.

13 The Nevada Supreme Court has held that “a presumption of inadmissibility attaches to all
14 prior bad act evidence.” *Rosky v. State*, 121 Nev. 184, 195 (2005). The main concern with
15 admitting prior bad acts is that the jury will “be unduly influenced by the evidence, and convict the
16 accused because it believes the accused is a bad person.” *Tavares v. State*, 117 Nev. 725, 730
17 (2001).

18 The Nevada Supreme Court has also held that “the use of uncharged bad act evidence to
19 convict a defendant is heavily disfavored in our criminal justice system because bad acts are often
20 irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated
21 charges.” *Walker v. State*, 116 Nev. 442, 445 (2000); see also *Berner v. State*, 104 Nev. 695, 696
22 (1988). The use of prior act evidence ‘should always be approached with circumspection’.
23 *Ledbetter v. State*, 122 Nev. 252 (2006).

24 Additionally, NRS 48.035 provides that “...evidence is not admissible if its probative value
25 is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of
26 misleading the jury.” NRS 48.045(2) further includes that “...other crimes, wrongs, or acts is not
27
28

1 admissible to prove the character of a person in order to show that the person acted in conformity
2 therewith.”

3
4 Here, the State called only one witness – a man who is now 26 years old – to testify to the
5 alleged offenses. First and foremost, if the State believed they had enough evidence without
6 presenting corroboration (including DNA, statements of the defendant, etc), there was no reason
7 for them to have asked the questions at issue. Not only was the testimony improper hearsay, the
8 contents are clearly bad acts that directly implicate the Defendant in sexually deviant behavior.
9 One can only surmise that the State was concerned about the identification in this case given the
10 length of time between the alleged event and the Grand Jury testimony (17+ years), the age of
11 the Complainant at the time of the alleged event (9 years old) and the name of the assailant as
12 “Sam Cook”, which is not a known alias of Mr. McDonald.

13 Further, the explanation provided by the State for why he elicited the subject answers is
14 not a legal element of the crimes charged. It is of no legal relevance whether a complainant feels
15 a case has been handled appropriately. Without a legal basis for eliciting the answers, any
16 balance of prejudicial / probative can only resolve in a finding that the statements were overly
17 prejudicial. There is no counter-balance. Under NRS 48.035, any probative value was clearly
18 outweighed by prejudice to Mr. McDonald.

19 CONCLUSION

20 Therefore, and based on the foregoing, the defense respectfully requests this Honorable
21 Court to dismiss the charges in this case.

22 DATED this 29th day of October, 2018.

23 PHILIP J. KOHN
24 CLARK COUNTY PUBLIC DEFENDER

25 By: /s/ Tegan C. Machnich
26 TEGAN C. MACHNICH, #11642
27 Chief Deputy Public Defender
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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the foregoing PETITION FOR WRIT OF HABEAS CORPUS will be heard on November 14, 2018, at 8:30 a.m. in District Court, Department X.

DATED this 29th day of October, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Chief Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing Petition for Writ of Habeas Corpus was served via electronic e-filing to the Clark County District Attorney's Office on this 29th day of October, 2018.

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office



1 **RET**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JACOB J. VILLANI
6 Chief Deputy District Attorney
7 Nevada Bar #011732
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 State of Nevada

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 In the Matter of Application,
10 of
11 **SAMUEL MCDONALD,**
12 **#1753770**
13 for a Writ of Habeas Corpus.

CASE NO: **C-18-334954-1**
DEPT NO: **X**

14 **STATE'S RETURN TO WRIT OF HABEAS CORPUS**

15 DATE OF HEARING: NOVEMBER 14, 2018
16 TIME OF HEARING: 8:30 A.M.

17 COMES NOW, JOE LOMBARDO, Sheriff of Clark County, Nevada, Respondent,
18 through his counsel, STEVEN B. WOLFSON, Clark County District Attorney, through
19 JACOB J. VILLANI, Chief Deputy District Attorney, in response to a Petition for Writ of
20 Habeas Corpus filed on the 29th day of October, 2018, and set for hearing on the 14th day of
21 November, 2018 at 8:30 A.M., before the above-entitled Court, and states as follows:

22 1. Respondent admits the allegations of Paragraph one of the Petitioner's
23 Petition for Writ of Habeas Corpus, with the caveat that Petitioner is currently housed at the
24 Nevada Department of Corrections.

25 2. Respondent denies the allegations of Paragraph three of the Petitioner's
26 Petition for Writ of Habeas Corpus.

27 3. Paragraphs two, four, five and six do not require admission or denial.

28 ///

4. The Petitioner is in the actual custody of JOE LOMBARDO, Clark County Sheriff, Respondent herein, pursuant to a Criminal Indictment, a copy of which is attached hereto as Exhibit 1 and incorporated by reference herein.

Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the Petition be dismissed.

DATED this 1st day of November, 2018.

Respectfully submitted,

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

BY /s/ Jacob J. Villani
JACOB J. VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

POINTS AND AUTHORITIES

PROCEDURAL HISTORY

On September 19, 2018, the State of Nevada (“State”) filed an Indictment charging Defendant Samuel McDonald (“Defendant”) with Counts 1 and 2 – Sexual Assault with a Minor Under Fourteen Years of Age (one count each for anal and oral penetration).

On October 10, 2018, Defendant was arraigned, pleaded not guilty, invoked the 60-day rule, and his trial was set to begin on December 10, 2018.

On October 29, 2018, Defendant filed the instant Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

On December 28, 2001, S.B. was nine years old and staying with Defendant at a place near University Medical Center. Grand Jury Transcript (“GJT”) 8. On that date, Defendant orally and anally penetrated S.B. with his penis. GJT 9-10. The rape lasted about 15 to 20 minutes, and S.B. told his mother about it when she got home. GJT 10. S.B.’s mother took him to UMC where a nurse took a Sexual Assault Kit (“SAK”) including intimate swabs. GJT 10. After he got the SAK, the next thing S.B. was able to remember was being told by his family

1 Defendant “did it to another little girl and got 30 years.” GJT 10-11. S.B. believed that his
2 mother was following up with his case. GJT 11. S.B. was next contacted about his case in
3 November of 2017. GJT 11.

4 LEGAL ARGUMENT

5 **STANDARD OF PROOF AT BEFORE THE GRAND JURY**

6 Under NRS 172.155 (1), “the grand jury ought to find an indictment when all the
7 evidence before them, taken together, establishes probable cause to believe that an offense has
8 been committed and that the defendant has committed it.”

9 “The pretrial writ of habeas corpus will issue when the evidence is insufficient to
10 establish probable cause that the accused committed the charged offense.” Sheriff v. Badillo,
11 95 Nev. 593, 594, 600 P.2d 221 (1979). See also Sheriff v. Milton, 109 Nev. 412, 414, 851
12 P.2d 417 (1993); Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340 (1971); Maskaly v. State,
13 85 Nev. 111, 113, 450 P.2d 790 (1969). “The finding of probable cause may be based on
14 slight, even ‘marginal’ evidence, because it does not involve a determination of the guilt or
15 innocence of an accused.” Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178 (1980). See also
16 Sheriff v. Shade, 109 Nev. 827, 828, 858 P.2d 840 (1993); Sheriff v. Simpson, 109 Nev. 430,
17 435, 851 P.2d 428 (1993); Milton, 109 Nev. at 414; Sheriff v. Crockett, 102 Nev. 359, 361,
18 724 P.2d 203 (1986); Badillo, 95 Nev. at 594. Thus, “the evidence need not be sufficient to
19 support a conviction.” Kinsey, 87 Nev. at 363. See also Hodes, 96 Nev. 184. “To commit an
20 accused for trial, the State is not required to negate all inferences which might explain his
21 conduct, but only to present enough evidence to support a reasonable inference that the accused
22 committed the offense.” Kinsey, 87 Nev. at 363. See also Shade, 109 Nev. at 828; Crockett,
23 102 Nev. at 361. “If an inference of criminal agency can reasonably be drawn, it is proper for
24 the grand jury to [find an indictment].” Sheriff v. Fernandez, 97 Nev. 61, 64, 624 P.2d 13,
25 (1981).

26 ///

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1 **I. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT**
2 **COMMITTED THE CRIME OF SEXUAL ASSAULT WITH A MINOR UNDER**
3 **FOURTEEN YEARS OF AGE AS FURTHER ALLEGED IN THE**
4 **INDICTMENT**

5 Defendant is charged with two counts Sexual Assault with a Minor Under Fourteen
6 Years of Age. S.B. testified before the grand jury that he was nine years old when Defendant
7 orally and anally penetrated S.B. with Defendant's penis.

8 In his Petition for Writ of Habeas Corpus, Defendant makes no argument regarding the
9 sufficiency or insufficiency of the evidence of probable cause for the charged acts presented
10 to the grand jury. Therefore, Defendant's Petition should be denied.

11 **II. S.B.'S TESTIMONY REGARDING A CRIME HE THOUGHT DEFENDANT**
12 **SUBSEQUENTLY COMMITTED HAD NO BEARING ON THE GRAND**
13 **JURY'S FINDING OF PROBABLE CAUSE**

14 Defendant quotes a portion of the grand jury transcript wherein S.B. stated what he
15 thought happened to Defendant in response to a question regarding what he remembered about
16 the case after he got his SAK. The State further questioned S.B. about whether he attempted
17 to follow up on his case, to which he responded his mother followed up. The State then
18 instructed the grand jury to disregard S.B.'s comment regarding Defendant molesting another
19 girl and going to prison for that. The State then (rather inartfully) commented "I'm just offering
20 it for why he felt the case had been handled appropriately." GJT 11.

21 The grand jurors were instructed to ignore S.B.'s allegation regarding another girl, and
22 told "[t]hat has nothing to do with this case." GJT 11. The allegation made by S.B. was not
23 hearsay, as it was not offered for the truth of the matter asserted. In fact, S.B.'s statement was
24 not accurate so it could not have been offered for its truth. Defendant did not subsequently
25 molest one other girl, he subsequently molested three other girls. See Exhibit 2. Also,
26 Defendant did not get a sentence of 30 years, he was sentenced to Life in prison with a
27 possibility of parole after 10 years on Count 1 (Lewdness with a Child Under the Age of 14),
28 and 2 to 15 years on Count 2 (Attempt Sexual Assault with a Minor Under Sixteen Years of
Age). Count 2 was ordered to run consecutively to Count 1. See Exhibit 3. S.B.'s statement
was incorrect, further evidencing the fact that the statement was not hearsay.

Moreover, even assuming *arguendo* the State intended S.B.'s uninvited comment to be considered by the grand jury as a bad act, such evidence is entirely admissible and not precluded as a "bad act." Defendant quotes a portion of NRS 48.045 in his Petition, conveniently leaving out the subsection of NRS 48.045 that is applicable to the instant case. NRS 48.045 reads, in its entirety:

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

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

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

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

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

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

Emphasis added. Lewdness with a Minor, Sexual Assault, and Attempt Sexual Assault are all considered "sexual offenses" under NRS 179D.097. Under NRS 48.045, sexual offenses are precluded from analysis under "bad act" statutes and case law. Therefore, even assuming, *arguendo*, the State was actually seeking to get in bad act evidence to help its finding of probable cause, such evidence is entirely admissible. Of course, if the State actually wanted this evidence to be considered by the grand jury the easiest way to do so would have been to simply admit Defendant's Judgement of Conviction as an exhibit. The least direct path would

1 be to ask an innocuous question to S.B. and hope his answer included a recitation of
2 Defendant's criminal record, which is what happened in the instant case.

3 The alleged "bad act" evidence in this case was inadvertently heard by the grand jurors,
4 and cured with an instruction to disregard the testimony. The burden of showing probable
5 cause was met before the comment was made, when S.B. testified regarding the acts Defendant
6 subjected him to as a nine-year-old boy. A jury is presumed to follow its instructions. Leonard
7 v. State, 117 Nev. 53, 66 (2001). Here, the jury was instructed to "ignore the allegation that
8 [Defendant] did this to another girl and that he went to prison for that." GJT 11. This Court
9 must assume the grand jury followed the State's instruction absent any evidence to the
10 contrary. Defendant has not provided this Court with any evidence or authority to support his
11 assertion that a jury given a curative instruction may still have considered the evidence at issue.
12 Therefore, Defendant's argument lacks merit and his Petition should be denied.

13 **CONCLUSION**

14 Based upon the foregoing argument, the State respectfully requests this Court deny
15 Defendant's Petition for Writ of Habeas Corpus.

16 DATED this 1st day of November, 2018.

17 Respectfully submitted,

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

20 BY /s/ Jacob J. Villani
21 JACOB J. VILLANI
22 Chief Deputy District Attorney
23 Nevada Bar #011732
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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 1st day of
November, 2018, by electronic transmission to:

TEGAN MACHNICH, Deputy Public Defender
E-mail Address: tegan.machnich@clarkcountynv.gov

ANN MCMAHAN, Legal Secretary
E-mail Address: mcmahaac@clarkcountynv.gov

BY: /s/ J. Georges
Secretary for the District Attorney's Office

JV/jg/SVU

ORIGINAL

1 IND
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JACOB VILLANI
6 Chief Deputy District Attorney
7 Nevada Bar #11732
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

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

SEP 19 2018

BY 
KIMBERLY ESTALA, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

CASE NO: C-18-334954-1

11 -vs-

DEPT NO: X

12 SAMUEL MCDONALD, aka,
13 Samuel Craig McDonald, #1753770

14 Defendant.

INDICTMENT

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss.

17 The Defendant above named, SAMUEL MCDONALD, aka, Samuel Craig McDonald,
18 accused by the Clark County Grand Jury of the crime(s) of SEXUAL ASSAULT WITH A
19 MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony - NRS 200.364,
20 200.366 - NOC 50105), committed at and within the County of Clark, State of Nevada, on or
21 about the 28th day of December, 2001, as follows:

22 COUNT 1

23 did then and there willfully, unlawfully, and feloniously sexually assault and subject
24 S.B., a child under fourteen years of age, to sexual penetration, to wit: fellatio: by placing his
25 penis on or in the mouth of S.B., against his or her will, or under conditions in which Defendant
26 knew, or should have known, that S.B. was mentally or physically incapable of resisting or
27 understanding the nature of Defendant's conduct.

28 //

Exhibit 1

C-18-334954-1
IND
Indictment
4780730



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1 COUNT 2

2 did then and there willfully, unlawfully, and feloniously sexually assault and subject
3 S.B., a child under fourteen years of age, to sexual penetration, to wit: anal intercourse: by
4 placing his penis into the anal opening of the said S.B., against his or her will, or under
5 conditions in which Defendant knew, or should have known, that S.B. was mentally or
6 physically incapable of resisting or understanding the nature of Defendant's conduct.

7 DATED this 5th day of September, 2018.

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

10
11 BY


12 JACOB VILLANI
13 Chief Deputy District Attorney
Nevada Bar #11732

14
15
16 ENDORSEMENT: A True Bill

17
18 
19 Foreperson, Clark County Grand Jury

1 Names of Witnesses and testifying before the Grand Jury:

2 S.B. – c/o CCDA, 200 Lewis Avenue, LV, NV 89101

3

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

5 CUSTODIAN OF RECORDS - CCDC

6 CUSTODIAN OF RECORDS - LVMPD COMMUNICATIONS

7 CUSTODIAN OF RECORDS - LVMPD RECORDS

8 TOOLEY, SHANNON – LVMPD #6224

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27 18AGJ050X/18F07303X/cl-GJ

28 LVMPD EV# 0112280052

(TK3)

ORIGINAL

1 GMEM

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 STACY L. KOLLINS
6 Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

FILED IN OPEN COURT
DEC 15 2005
SHIRLEY B. PARRAGUIRRE, CLERK
BY *[Signature]*
PHYLLIS IRBY DEPUTY

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 SAMUEL CRAIG MCDONALD,
13 #1753770

14 Defendant.

CASE NO: C217360
DEPT NO: XX

15 GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25
17 (1970), to: **COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14**
18 **(Category A, Felony - NRS 201.230); and COUNT 2 - ATTEMPT SEXUAL ASSAULT**
19 **WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category B, Felony - NRS**
20 **193.330, 200.364, 200.366), as more fully alleged in the charging document attached hereto**
21 **as Exhibit "1".**

22 My decision to plead guilty by way of the Alford decision is based upon the plea
23 agreement in this case which is as follows:

24 The State and the Defendant agree to stipulate to prison terms in the Nevada
25 Department of Corrections for ten (10) years to Life on Count 1 - Lewdness with a Child
26 Under the Age of 14 and two (2) to fifteen (15) years on Count 2 - Attempt Sexual Assault
27 with a Minor Under Sixteen Years of Age. The State will make no recommendation as to
28 concurrent or consecutive sentences.

Exhibit 2

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RECEIVED
DEC 15 2005
CLERK

1 The Defendant agrees that if he fails to appear for any court appearances or Parole &
2 Probation appearances, the sentences for each offense will run consecutive. Further, the
3 State agrees the Defendant may stay out of custody on ISU until rendition of sentence. The
4 Defendant understands he is not eligible for probation. Additionally, the State may argue the
5 facts and circumstances of the offense at the time of sentencing.

6 CONSEQUENCES OF THE PLEA

7 By pleading guilty pursuant to the Alford decision, it is my desire to avoid the
8 possibility of being convicted of more offenses or of a greater offense if I were to proceed to
9 trial on the original charge(s) and of also receiving a greater penalty. I understand that my
10 decision to plead guilty by way of the Alford decision does not require me to admit guilt, but
11 is based upon my belief that the State would present sufficient evidence at trial that a jury
12 would return a verdict of guilty of a greater offense or of more offenses than that to which I
13 am pleading guilty to.

14 I understand that as a consequence of my plea of guilty by way of the Alford decision
15 to **Count 1**, the Court must sentence me to imprisonment in the Nevada State Prison for
16 LIFE with the possibility of parole with parole eligibility after a minimum of ten (10) years.
17 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum
18 term of imprisonment. I understand that the law requires me to pay an Administrative
19 Assessment Fee.

20 I understand that as a consequence of my plea of guilty by way of the Alford decision
21 to **Count 2**, the Court must sentence me to imprisonment in the Nevada Department of
22 Corrections for a minimum term of not less than two (2) years and a maximum term of not
23 more than twenty (20) years. The minimum term of imprisonment may not exceed forty
24 percent (40%) of the maximum term of imprisonment.

25 I understand that, if appropriate, I will be ordered to make restitution to the victim of
26 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
27 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
28 reimburse the State of Nevada for any expenses related to my extradition, if any.

1 I understand that, if appropriate, I will be ordered to make restitution to the victim of
2 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
3 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
4 reimburse the State of Nevada for any expenses related to my extradition, if any.

5 Further, that before I am eligible for parole a panel consisting of the administrator of
6 the mental health and developmental services of the department of human resources or his
7 designee; the director of the department of corrections or his designee; and a psychologist
8 license to practice in this state or a psychiatrist license to practice medicine in this state
9 certifies that I was under observation while confined in an institution of the department of
10 corrections that I do not represent a high risk to reoffend based upon a currently accepted
11 standard of assessment.

12 I further understand that the Court will include as part of my sentence, in addition to
13 any other penalties provided by law, lifetime supervision commencing after any period of
14 probation or any term of imprisonment and period of release upon parole; said special
15 sentence of lifetime supervision must begin upon release from incarceration.

16 I further understand that the Court will include as part of my sentence, in addition to
17 any other penalties provided by law, pursuant to NRS 179D.450, I must register as a sex
18 offender within 48 hours of release from custody.

19 I also understand that I must submit to blood and/or saliva tests under the Direction of
20 the Division of Parole and Probation to determine genetic markers and/or secretor status.

21 I understand that if more than one sentence of imprisonment is imposed and I am
22 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
23 the sentences served concurrently or consecutively.

24 I understand that if more than one sentence of imprisonment is imposed and I am
25 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
26 the sentences served concurrently or consecutively.

27 I also understand that information regarding charges not filed, dismissed charges, or
28 charges to be dismissed pursuant to this agreement may be considered by the judge at

1 sentencing.

2 I have not been promised or guaranteed any particular sentence by anyone. I know
3 that my sentence is to be determined by the Court within the limits prescribed by statute.

4 I understand that if my attorney or the State of Nevada or both recommend any
5 specific punishment to the Court, the Court is not obligated to accept the recommendation.

6 I understand that if the State of Nevada has agreed to recommend or stipulate a
7 particular sentence or has agreed not to present argument regarding the sentence, or agreed
8 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor
9 when the offense could have been treated as a felony, such agreement is contingent upon my
10 appearance in court on the initial sentencing date (and any subsequent dates if the sentencing
11 is continued). I understand that if I fail to appear for the scheduled sentencing date or I
12 commit a new criminal offense prior to sentencing the State of Nevada would regain the full
13 right to argue for any lawful sentence.

14 I understand if the offense(s) to which I am pleading guilty to was committed while I
15 was incarcerated on another charge or while I was on probation or parole that I am not
16 eligible for credit for time served toward the instant offense(s).

17 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
18 United States, I may, in addition to other consequences provided for by federal law, be
19 removed, deported, excluded from entry into the United States or denied naturalization.

20 I understand that the Division of Parole and Probation will prepare a report for the
21 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
22 sentencing, including my criminal history. This report may contain hearsay information
23 regarding my background and criminal history. My attorney and I will each have the
24 opportunity to comment on the information contained in the report at the time of sentencing.
25 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
26 may also comment on this report.

27 WAIVER OF RIGHTS

28 By entering my plea of guilty, I understand that I am waiving and forever giving up

1 the following rights and privileges:

2 1. The constitutional privilege against self-incrimination, including the right to refuse
3 to testify at trial, in which event the prosecution would not be allowed to comment to the
4 jury about my refusal to testify.

5 2. The constitutional right to a speedy and public trial by an impartial jury, free of
6 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
7 assistance of an attorney, either appointed or retained. At trial the State would bear the
8 burden of proving beyond a reasonable doubt each element of the offense charged.

9 3. The constitutional right to confront and cross-examine any witnesses who would
10 testify against me.

11 4. The constitutional right to subpoena witnesses to testify on my behalf.

12 5. The constitutional right to testify in my own defense.

13 6. The right to appeal the conviction, with the assistance of an attorney, either
14 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional
15 or other grounds that challenge the legality of the proceedings and except as otherwise
16 provided in subsection 3 of NRS 174.035.

17 VOLUNTARINESS OF PLEA

18 I have discussed the elements of all of the original charge(s) against me with my
19 attorney and I understand the nature of the charge(s) against me.

20 I understand that the State would have to prove each element of the charge(s) against
21 me at trial.

22 I have discussed with my attorney any possible defenses, defense strategies and
23 circumstances which might be in my favor.

24 All of the foregoing elements, consequences, rights, and waiver of rights have been
25 thoroughly explained to me by my attorney.

26 I believe that pleading guilty and accepting this plea bargain is in my best interest,
27 and that a trial would be contrary to my best interest.

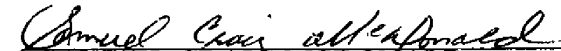
28 I am signing this agreement voluntarily, after consultation with my attorney, and I am

1 not acting under duress or coercion or by virtue of any promises of leniency, except for those
2 set forth in this agreement.


3 I am not now under the influence of any intoxicating liquor, a controlled substance or
4 other drug which would in any manner impair my ability to comprehend or understand this
5 agreement or the proceedings surrounding my entry of this plea.

6 My attorney has answered all my questions regarding this guilty plea agreement and
7 its consequences to my satisfaction and I am satisfied with the services provided by my
8 attorney.

9 DATED this 15th day of December, 2005.

10 
11 SAMUEL CRAIG MCDONALD
12 Defendant

13 AGREED TO BY:

14 
15 STACY L. ROLLINS
16 Deputy District Attorney
17 Nevada Bar #005391
18
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1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
to which Alford pleas are being entered.

5 2. I have advised the Defendant of the penalties for each charge and the restitution
6 that the Defendant may be ordered to pay.

7 3. All pleas of Alford offered by the Defendant pursuant to this agreement are
consistent with the facts known to me and are made with my advice to the Defendant.

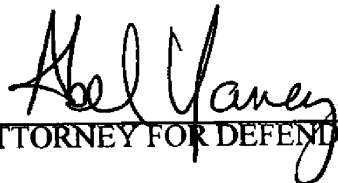
8 4. To the best of my knowledge and belief, the Defendant:

9 a. Is competent and understands the charges and the consequences of pleading
10 Alford as provided in this agreement.

11 b. Executed this agreement and will enter all Alford pleas pursuant hereto
voluntarily.

12 c. Was not under the influence of intoxicating liquor, a controlled substance or
13 other drug at the time I consulted with the Defendant as certified in paragraphs
1 and 2 above.

14 Dated: This 15th day of December, 2005.

15 
ATTORNEY FOR DEFENDANT

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28 ct/SVU

Shirley Stanagin
CLERK

1 **INFOSA**
2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
5 **STACY L. KOLLINS**
6 Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 12/15/05
13 9:00 A.M.
14 PD A. YANEZ

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 SAMUEL CRAIG MCDONALD,
19 #1753770

20 Defendant.

Case No: C217360
Dept No: XX

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 DAVID ROGER, District Attorney within and for the County of Clark, State of
24 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That SAMUEL CRAIG MCDONALD, the Defendant(s) above named, having
26 committed the crimes of **LEWDNESS WITH A CHILD UNDER THE AGE OF 14**
27 (Category A, Felony - NRS 201.230); and **ATTEMPT SEXUAL ASSAULT WITH A**
28 **MINOR UNDER SIXTEEN YEARS OF AGE** (Category B, Felony - NRS 193.330,
200.364, 200.366), on or between March 1, 2004 and August 9, 2005, within the County of
Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made
and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did then and there wilfully, lewdly, unlawfully, and feloniously commit a lewd or
lascivious act with the body of DOMINISHA WARD and/or AMARI SMITH and/or

EXHIBIT "1"

1 KIARRA SMITH, a child under the age of fourteen years, by rubbing and/or touching the
2 anal opening of the said DOMINISHA WARD and/or AMARI SMITH and/or KIARRA
3 SMITH with his penis, with the intent of arousing, appealing to, or gratifying the lust,
4 passions, or sexual desires of said Defendant, or said child.

5 COUNT 2 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN
6 YEARS OF AGE

7 did then and there wilfully, unlawfully, and feloniously attempt to sexually assault
8 and subject DOMINISHA WARD and/or AMARI SMITH and/or KIARRA SMITH, female
9 children under sixteen years of age, to sexual penetration, to-wit: anal intercourse, by the
10 Defendant attempting to insert his penis into the anal opening of the said DOMINISHA
11 WARD and/or AMARI SMITH and/or KIARRA SMITH, against their will, or under
12 conditions in which Defendant knew, or should have known, that the said DOMINISHA
13 WARD and/or AMARI SMITH and/or KIARRA SMITH were mentally or physically
14 incapable of resisting or understanding the nature of Defendant's conduct.

15
16 DAVID ROGER
17 DISTRICT ATTORNEY
18 Nevada Bar #002781

19 BY /s/ Stacy L. Kollins
20 STACY L. KOLLINS
21 Deputy District Attorney
22 Nevada Bar #005391
23
24
25

26 DA#05FN1441X/ct/SVU
27 NLVPD EV#0520339
28 LEWD W/CHILD U/14;
ATT SEX ASSLT U/16 - F
(TK3)

ORIGINAL

FILED

FEB 8 11 26 AM '06

Liberty E. Rungius
CLERK

JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

SAMUEL CRAIG MCDONALD,
#1753770

Defendant.

Case No: C217360

Dept No: XX

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of **COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A, Felony)**, in violation of NRS 201.230; and **COUNT 2 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category B, Felony)**, in violation of NRS 193.330, 200.364, 200.366, pursuant to Alford plea; thereafter, on the 31st day of January, 2006, the Defendant was present in court for sentencing with his counsel, ABEL M. YANEZ, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee, and the \$150.00 DNA Analysis fee including testing to determine genetic markers, the Defendant is sentenced as follows: to

COUNT 1 - LIFE in the Nevada Department of Corrections (NDC) with the possibility of parole beginning when a minimum of TEN (10) YEARS is served, and

Exhibit 3

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COUNTY CLERK

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COUNT 2 - to a MAXIMUM of ONE HUNDRED & EIGHTY (180) MONTHS and
a MINIMUM of TWENTY-FOUR (24) MONTHS in NDC. Sentence in Count 2
CONSECUTIVE to sentence in Count 1, with TWO (2) DAYS credit for time served.

COURT FURTHER ORDERED, Lifetime Supervision to commence upon release
from any term of probation, parole, or imprisonment. Deft. shall register as a sex offender
within 48 hours of sentencing or release from custody. Deft. REMANDED to custody.

DATED this 6 day of February, 2006.


DISTRICT JUDGE

cf

ct/SVU



1 **NOTM**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JACOB J. VILLANI
6 Chief Deputy District Attorney
7 Nevada Bar #011732
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11
12 Plaintiff,

13 -vs-

14 **SAMUEL MCDONALD, aka,**
15 **Samuel Craig McDonald, #1753770**

16 Defendant.

CASE NO: **C-18-334954-1**

DEPT NO: **X**

17 **STATE'S NOTICE OF MOTION AND MOTION IN LIMINE TO ADMIT**
18 **EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS THAT CONSTITUTE**
19 **SEPARATE SEXUAL OFFENSES**

20 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the the State of
21 Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JACOB J.
22 VILLANI, Chief Deputy District Attorney, will bring a **Motion in Limine to Admit Evidence**
23 **of Other Crimes, Wrongs or Acts that Constitute Separate Sexual Offenses** before the
24 above entitled Court on the **14th** day of November, 2018, at the hour of 8:30 o'clock A.M.,
25 or as soon thereafter as counsel may be heard.

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

//

//

1 POINTS AND AUTHORITIES

2 PROCEDURAL HISTORY

3 On October 20, 2005, the State of Nevada ("State") filed an Amended Criminal
4 Complaint in Case 05FN1441X charging Defendant Samuel McDonald ("Defendant") with:
5 Counts 1 & 2 – Sexual Assault with a Minor Under Fourteen Years of Age (Victim D.W.);
6 Counts 3, 4, 5 & 6 – Sexual Assault with a Minor Under Fourteen Years of Age (Victim A.S.);
7 Counts 7 & 8 – Sexual Assault with a Minor Under Fourteen Years of Age (Victim K.S.);
8 Count 9 – Lewdness with a Child Under the Age of 14 (Victim K.S.); and Count 10 –
9 Lewdness with a Child Under the Age of 14 (Victim D.W.). Also in the Amended Criminal
10 Complaint it is noted that Defendant was previously "convicted of Lewdness/Lascivious acts
11 with a Child in the State of California in 1989." Exhibit 1.

12 On December 15, 2005, Defendant entered into a Guilty Plea Agreement ("GPA") with
13 the State in case 05C217360 wherein he pleaded guilty to Count 1 – Lewdness with a Child
14 Under the Age of 14 (Naming Victims D.W., A.S., and K.S.); and Count 2 – Attempt Sexual
15 Assault with a Minor Under Sixteen Years of Age (Naming Victims D.W., A.S., and K.S.).
16 Exhibit 2.

17 On January 31, 2006, Defendant was sentenced to serve Life in prison with the
18 possibility of parole after 10 years on Count 1, and 2 to 10 years on Count 2. Count 2 was
19 ordered to run consecutively to Count 1. Exhibit 3.

20 On September 19, 2018, the State of Nevada ("State") filed an Indictment charging
21 Defendant with Counts 1 and 2 – Sexual Assault with a Minor Under Fourteen Years of Age
22 (Victim S.B.).

23 On October 10, 2018, Defendant was arraigned, pleaded not guilty, invoked the 60-day
24 rule, and his trial was set to begin on December 10, 2018.

25 On October 29, 2018, Defendant filed a Petition for Writ of Habeas Corpus.

26 STATEMENT OF FACTS PERTINENT TO THIS MOTION

27 On August 18, 2005, Officer Watson with the North Las Vegas Police Department
28 responded to Sunrise Hospital Pediatric Emergency Room reference a sexual assault on two

1 minors. Exhibit 4. Officer Watson contacted the mother of the minors, Tuwanna Smith, who
2 told him that on August 16, 2005, her 11-year-old daughter, D.W., came to her and asked if
3 she still liked "Sam," referring to Defendant. Tuwanna told D.W. "yes," and D.W. told
4 Tuwanna that Defendant was nasty and that she needed to talk to A.S. and K.S., her little
5 brother and sister. Tuwanna asked A.S. and K.S. if they needed to tell her anything. K.S. told
6 A.S. to go first. A.S. told Tuwanna that Defendant put his "wee wee" in his butt. K.S. told
7 Tuwanna that Defendant did the same thing to her. Tuwanna asked the children when this
8 happened, and the children replied that it happened "last Tuesday," which would have been
9 August 9, 2005.

10 Tuwanna contacted Sunrise Hospital and was given an appointment for a SCAN exam
11 for the children. Tuwanna told Officer Watson there were four small children living in the
12 house: D.W. (age 11); E.B. (age 4); A.S. (age 9); and K.S. (age 6). Officer Watson requested
13 that all of the children be examined and forensic interviews be conducted. Dr. N. Metha
14 interviewed all four children.

15 D.W. told Dr. Metha Defendant put his finger in her butt one night while driving to the
16 store. She said Defendant pulled over to the side of the road and pulled her pants down and
17 stuck his hand into her panties. Defendant told her she would get a whipping if she told
18 anybody.

19 A.S. told Dr. Metha that Defendant "does gay things" to him. When asked to explain,
20 A.S. told her Defendant puts his thing in A.S.'s butt and it hurts. A.S. said Defendant uses
21 "grease" when he did this.

22 K.S. told Dr. Metha that Defendant touches her front and back privates. She said
23 Defendant used grease on her butt and it felt nasty.

24 E.B. made no disclosures to Dr. Metha.

25 Defendant was arrested based upon the above disclosures and eventually pleaded guilty
26 and was sentenced on January 31, 2006 as indicated, *supra*, in the Procedural History section.

27 On December 28, 2001, S.B. was nine years old and staying with Defendant at a place
28 near University Medical Center. On that date, Defendant orally and anally penetrated S.B.

1 with his penis. The rape lasted about 15 to 20 minutes, and S.B. told his mother about it when
2 she got home. S.B.'s mother took him to UMC where a nurse took a Sexual Assault Kit
3 ("SAK") including intimate swabs. S.B.'s SCAN examination indicated that he had "multiple
4 superficial lacerations just deep enough to ooze a small amount of blood extending radially
5 from the rectum. This is consistent with rectal penetration." S.B. believed that his mother was
6 following up with his case.

7 In March of 2017, as a result of funding received pursuant to the Sexual Assault Kit
8 Initiative ("SAKI") grant to test all untested rape kits, S.B.'s SAK (which had gone untested)
9 was tested by Bode Cellmark Forensics. An unknown male DNA profile was developed from
10 the sperm fraction of S.B.'s rectal swabs and uploaded into the Combined DNA Index System
11 ("CODIS").

12 On August 14, 2017, LVMPD received a CODIS hit returning to Defendant. On
13 January 18, 2018, LVMPD detectives executed a search warrant and obtained a buccal swab
14 from Defendant. The buccal swab obtained was compared to the unknown DNA profile
15 developed by Bode Cellmark Forensics. LVMPD's forensic lab determined that the DNA
16 profile from Defendant's buccal matched the DNA profile from S.B.'s SAK rectal swabs. The
17 possibility of randomly selecting an unrelated individual from the general population having
18 a DNA profile that is consistent with the deduced DNA profile obtained is approximately 1 in
19 16.4 trillion.

20 21 LEGAL ARGUMENT

22 **PURSUANT TO NRS 48.045(3), EVIDENCE OF DEFENDANT'S OTHER SEXUAL** 23 **OFFENSES IS ADMISSIBLE TO SHOW DEFENDANT'S PROPENSITY TO** 24 **COMMIT SEXUAL OFFENSES**

25 NRS 48.045, as amended and effective as of October 1, 2015, provides, in pertinent
26 part:

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

...

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

5 Emphasis added.

6 Further, NRS 179D.097 defines “sexual offense” as follows:

7 1. “Sexual offense” means any of the following offenses:

8 ...

9 (b) Sexual assault pursuant to NRS 200.366.

10 ...

11 (d) Battery with intent to commit sexual assault pursuant to
 subsection 4 of NRS 200.400.

12 ...

13 (g) Abuse of a child pursuant to NRS 200.508, if the abuse
 involved sexual abuse or sexual exploitation.

14 ...

15 (j) Open or gross lewdness pursuant to NRS 201.210.

16 ...

17 (l) Lewdness with a child pursuant to NRS 201.230.

18 ...

19 (r) Any other offense that has an element involving a sexual act
 or sexual conduct with another.

20 (s) An attempt or conspiracy to commit an offense listed in
 paragraphs (a) to (r), inclusive . . .”

21 The quasi-recent amendments to NRS 48.045 mirror statutes drafted in a number of other
22 states including: California (Cal. Evid. Code Sec. 1108); Arizona (Ariz. R. Evid. 404); Alaska
23 (Alaska R. Evid. 404); Florida (Fla. Stat. Sec. 90.404); Georgia (Official Code of Georgia Sec.
24 24-4-413); Illinois (Illinois Compiled Statutes Sec. 5/115-7.3); Louisiana (Louisiana Statutes,
25 Art. 412.2); Utah (Utah Rule of Evidence 404); and Kansas (Kansas Statutes, Sec. 21.5502).
26 As currently amended, NRS 48.045 is almost identical to amendments made to the California
27 Evidence Code in the mid 1990’s and subsequently upheld by California Courts. Additionally,
28 the reasoning of the Nevada Legislature in enacting such amendments was similar to the
 reasoning of the California legislature.

///

1 California Evidence Code, section 1108 became effective on January 1, 1996. The
2 statute has since been determined to be valid and constitutional. See People v. Fitch 55 Cal.
3 App. 4th 172, 177-86 (1997). Specifically, the California Supreme Court, in upholding section
4 1108, emphasized the legislative history behind section 1108:

5 The Legislature's principal justification for adopting section 1108 was a
6 practical one: By their very nature, sex crimes are usually committed in
7 seclusion without third party witnesses or substantial corroborating evidence.
8 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.

9 People v. Falsetta 21 Cal. 4th 903, 915 (1999). Indeed, the Court explained that the "Legislature
10 has determined the need for this evidence is 'critical' given the serious and secretive nature of
11 sex crimes and the often resulting credibility contest at trial." Id. at 911 (citation omitted).

12 Similar to the effect of the amendment to NRS 48.045, California's Section 1108
13 explicitly supersedes Evidence Code, section 1101's prohibition of evidence of character or
14 disposition. See People v. Soto 64 Cal. App. 4th 966, 984 (1998). The purpose of Section 1108
15 is to permit trial courts to admit prior sexual assault evidence on a common sense basis,
16 without a precondition of finding a "non-character" purpose for which it is relevant, so that
17 juries are able to rationally assess such evidence. Id. at 983-84. This rational assessment
18 "includes consideration of other sexual offenses as evidence of the defendant's disposition to
19 commit such crimes, and for its bearing on the probability or improbability that the defendant
20 has been falsely or mistakenly accused." Id. at 984 (citation omitted). Evidence of prior sexual
21 conduct is highly probative and is admissible as propensity evidence. As has been indicated in
22 the analogous federal rules, the "presumption is in favor of admission." Id. at 989 (quoting
23 United States v. Sumner 119 F. 3d 658, 662 (8th Cir. 1997)). The California Supreme Court
24 further held that Section 1108 "implicitly abrogates prior decision of this court indicating that
25 'propensity' evidence is per se unduly prejudicial to the defense." People v. Villatoro, 281
26 P.3d 390 (Cal. 2012); See also; Falsetta, 21 Cal.4th at 911.

27 In the instant case, pursuant to NRS 48.045(3), evidence of other sexual offenses
28 committed by Defendant should be admitted. Here, the Defendant previously sexually

1 molested at least three children (the State is still attempting to obtain records from Defendant's
2 1989 conviction in California). The children Defendant pleaded guilty to molesting were all
3 between the ages of 6 and 11, and included both boys and girls. Defendant committed these
4 crimes after committing the crimes with which he is currently charged, and these sexual
5 offenses all fall within the definition of "sexual offense" under NRS 179D.097.

6 Furthermore, NRS 48.045 does not even require that a defendant be convicted of an
7 offense, it explicitly allows: "evidence in a criminal prosecution for a sexual offense that a
8 person *committed* another crime, wrong or act that constitutes a separate sexual offense"
9 (emphasis added). In this case, Defendant pleaded guilty to the crimes. As such, the evidence
10 that they occurred must be permitted under NRS 48.045.

11 In short, it is stunning that the Defendant has victimized so many young children. The
12 probative weight of the breadth and scope of his sexual abuse of children is enormous. For
13 crimes like these, pursuant to NRS 48.045(3), a jury is entitled to know that his behavior in
14 this case involving S.B. is not an isolated event, but actions that have repeatedly occurred with
15 others over the years. It should also be noted that unlike the prejudicial/probative analysis that
16 is conducted for bad act evidence, no such analysis is required under NRS 48.045(3) as it is
17 explicitly permits the admission of prior sexual offenses. Thus, evidence of these prior sexual
18 offenses should be admitted for propensity purposes.

19 CONCLUSION

20 Based upon foregoing, the State respectfully requests this Court grant the State's Notice
21 of Motion and Motion in Limine to Admit Evidence of Other Crimes, Wrongs, or Acts that
22 Constitute Separate Sexual Offenses.

23 DATED this 1st day of November, 2018.

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

27 BY /s/ Jacob J. Villani
28 JACOB J. VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 1st day of
November, 2018, by electronic transmission to:

TEGAN MACHNICH, Deputy Public Defender
E-mail Address: tegan.machnich@clarkcountynv.gov

ANN MCMAHAN, Legal Secretary
E-mail Address: mcmahaae@clarkcountynv.gov

BY: /s/ J. Georges
Secretary for the District Attorney's Office

18F07303X/jg/SVU

JUSTICE COURT, NORTH LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED IN OPEN COURT
OCT 20 2005
CLERK DATE

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL CRAIG MCDONALD,
#1753770,

Defendant.

CASE NO: 05FN1441X

DEPT NO: 1

AMENDED

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Felony - NRS 200.364, 200.366); and LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Felony - NRS 201.230), in the manner following, to-wit: That the said Defendant, on or between March 1, 2004, and August 9, 2005, at and within the County of Clark, State of Nevada,

COUNT 1 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, on or between March 1, 2004, and March 1, 2005, then and there wilfully, unlawfully, and feloniously sexually assault and subject DOMINISHA WARD, a female child under fourteen years of age, to sexual penetration, to-wit: digital penetration, by inserting his finger into the anal opening of the said DOMINISHA WARD, against her will, or under conditions in which Defendant knew, or should have known, that the said DOMINISHA WARD was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct, said Defendant having previously been convicted of Lewdness/Lascivious acts with a Child in the State of California in 1989.

COUNT 2 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, on or between March 1, 2004, and March 1, 2005, then and there wilfully, unlawfully, and feloniously sexually assault and subject DOMINISHA WARD, a female child under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing

Exhibit 1

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1 his penis into the anal opening of the said DOMINISHA WARD, against her will, or under
2 conditions in which Defendant knew, or should have known, that the said DOMINISHA
3 WARD was mentally or physically incapable of resisting or understanding the nature of
4 Defendant's conduct said Defendant having previously been convicted of
5 Lewdness/Lascivious acts with a Child in the State of California in 1989.

6 COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
7 AGE

8 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
9 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
10 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
11 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
12 in which Defendant knew, or should have known, that the said AMARI SMITH was
13 mentally or physically incapable of resisting or understanding the nature of Defendant's
14 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
15 a Child in the State of California in 1989.

16 COUNT 4 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
17 AGE

18 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
19 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
20 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
21 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
22 in which Defendant knew, or should have known, that the said AMARI SMITH was
23 mentally or physically incapable of resisting or understanding the nature of Defendant's
24 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
25 a Child in the State of California in 1989.

26 COUNT 5 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
27 AGE

28 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,

1 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
2 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
3 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
4 in which Defendant knew, or should have known, that the said AMARI SMITH was
5 mentally or physically incapable of resisting or understanding the nature of Defendant's
6 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
7 a Child in the State of California in 1989.

8 COUNT 6 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
9 AGE

10 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
11 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
12 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
13 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
14 in which Defendant knew, or should have known, that the said AMARI SMITH was
15 mentally or physically incapable of resisting or understanding the nature of Defendant's
16 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
17 a Child in the State of California in 1989.

18 COUNT 7 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
19 AGE

20 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
21 unlawfully, and feloniously sexually assault and subject KIARRA SMITH, a female child
22 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
23 penis into the anal opening of the said KIARRA SMITH, against her will, or under
24 conditions in which Defendant knew, or should have known, that the said KIARRA SMITH
25 was mentally or physically incapable of resisting or understanding the nature of Defendant's
26 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
27 a Child in the State of California in 1989.

28 //

1 COUNT 8 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
2 AGE

3 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
4 unlawfully, and feloniously sexually assault and subject KIARRA SMITH, a female child
5 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
6 penis into the anal opening of the said KIARRA SMITH, against her will, or under
7 conditions in which Defendant knew, or should have known, that the said KIARRA SMITH
8 was mentally or physically incapable of resisting or understanding the nature of Defendant's
9 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
10 a Child in the State of California in 1989.

11 COUNT 9 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

12 did, on or between March 1, 2004, and March 1, 2005, then and there wilfully,
13 lewdly, unlawfully, and feloniously commit a lewd or lascivious act with the body of
14 KIARRA SMITH, a child under the age of fourteen years, by fondling the genitals and/or
15 buttocks of the said KIARRA SMITH with his hand, with the intent of arousing, appealing
16 to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child said
17 Defendant having previously been convicted of Lewdness/Lascivious acts with a Child in the
18 State of California in 1989.

19 COUNT 10 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

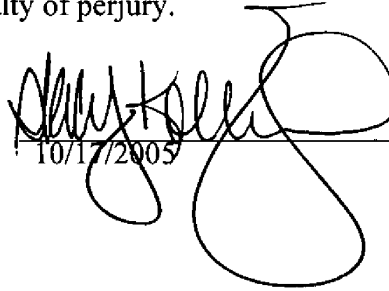
20 did, on or between March 1, 2004, and March 1, 2005, then and there wilfully,
21 lewdly, unlawfully, and feloniously commit a lewd or lascivious act with the body of
22 DOMINISHA WARD, a child under the age of fourteen years, by fondling the genitals
23 and/or buttocks of the said DOMINISHA WARD with his hand, with the intent of arousing,
24 appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said
25 child said Defendant having previously been convicted of Lewdness/Lascivious acts with a
26 Child in the State of California in 1989.

27 All of which is contrary to the form, force and effect of Statutes in such cases made

28 //

1 and provided and against the peace and dignity of the State of Nevada. Said Complainant
2 makes this declaration subject to the penalty of perjury.

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10/17/2005

05FN1441X/ct/SVU
NLVPD EV# 05-20339
SEX ASSLT; VICT U/14;
LEWD W/MINOR - PRIOR - F
(TK3)

ORIGINAL

1 **GMEM**

2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **STACY L. KOLLINS**
6 **Deputy District Attorney**
7 **Nevada Bar #005391**
8 **200 Lewis Avenue**
9 **Las Vegas, NV 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

FILED IN OPEN COURT
DEC 15 2005
SHIRLEY B. PARRAGUIRRE, CLERK
BY *[Signature]*
PHYLLIS IRBY DEPUTY

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **-vs-**

12 **SAMUEL CRAIG MCDONALD,**
13 **#1753770**

14 **Defendant.**

CASE NO: C217360
DEPT NO: XX

15 **GUILTY PLEA AGREEMENT**

16 I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25
17 (1970), to: **COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14**
18 **(Category A, Felony - NRS 201.230); and COUNT 2 - ATTEMPT SEXUAL ASSAULT**
19 **WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category B, Felony - NRS**
20 **193.330, 200.364, 200.366), as more fully alleged in the charging document attached hereto**
21 **as Exhibit "1".**

22 My decision to plead guilty by way of the Alford decision is based upon the plea
23 agreement in this case which is as follows:

24 The State and the Defendant agree to stipulate to prison terms in the Nevada
25 Department of Corrections for ten (10) years to Life on Count 1 - Lewdness with a Child
26 Under the Age of 14 and two (2) to fifteen (15) years on Count 2 - Attempt Sexual Assault
27 with a Minor Under Sixteen Years of Age. The State will make no recommendation as to
28 concurrent or consecutive sentences.

Exhibit 2

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RECEIVED
DEC 15 2005
CLERK

1 The Defendant agrees that if he fails to appear for any court appearances or Parole &
2 Probation appearances, the sentences for each offense will run consecutive. Further, the
3 State agrees the Defendant may stay out of custody on ISU until rendition of sentence. The
4 Defendant understands he is not eligible for probation. Additionally, the State may argue the
5 facts and circumstances of the offense at the time of sentencing.

6 CONSEQUENCES OF THE PLEA

7 By pleading guilty pursuant to the Alford decision, it is my desire to avoid the
8 possibility of being convicted of more offenses or of a greater offense if I were to proceed to
9 trial on the original charge(s) and of also receiving a greater penalty. I understand that my
10 decision to plead guilty by way of the Alford decision does not require me to admit guilt, but
11 is based upon my belief that the State would present sufficient evidence at trial that a jury
12 would return a verdict of guilty of a greater offense or of more offenses than that to which I
13 am pleading guilty to.

14 I understand that as a consequence of my plea of guilty by way of the Alford decision
15 to **Count 1**, the Court must sentence me to imprisonment in the Nevada State Prison for
16 LIFE with the possibility of parole with parole eligibility after a minimum of ten (10) years.
17 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum
18 term of imprisonment. I understand that the law requires me to pay an Administrative
19 Assessment Fee.

20 I understand that as a consequence of my plea of guilty by way of the Alford decision
21 to **Count 2**, the Court must sentence me to imprisonment in the Nevada Department of
22 Corrections for a minimum term of not less than two (2) years and a maximum term of not
23 more than twenty (20) years. The minimum term of imprisonment may not exceed forty
24 percent (40%) of the maximum term of imprisonment.

25 I understand that, if appropriate, I will be ordered to make restitution to the victim of
26 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
27 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
28 reimburse the State of Nevada for any expenses related to my extradition, if any.

1 I understand that, if appropriate, I will be ordered to make restitution to the victim of
2 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
3 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
4 reimburse the State of Nevada for any expenses related to my extradition, if any.

5 Further, that before I am eligible for parole a panel consisting of the administrator of
6 the mental health and developmental services of the department of human resources or his
7 designee; the director of the department of corrections or his designee; and a psychologist
8 license to practice in this state or a psychiatrist license to practice medicine in this state
9 certifies that I was under observation while confined in an institution of the department of
10 corrections that I do not represent a high risk to reoffend based upon a currently accepted
11 standard of assessment.

12 I further understand that the Court will include as part of my sentence, in addition to
13 any other penalties provided by law, lifetime supervision commencing after any period of
14 probation or any term of imprisonment and period of release upon parole; said special
15 sentence of lifetime supervision must begin upon release from incarceration.

16 I further understand that the Court will include as part of my sentence, in addition to
17 any other penalties provided by law, pursuant to NRS 179D.450, I must register as a sex
18 offender within 48 hours of release from custody.

19 I also understand that I must submit to blood and/or saliva tests under the Direction of
20 the Division of Parole and Probation to determine genetic markers and/or secretor status.

21 I understand that if more than one sentence of imprisonment is imposed and I am
22 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
23 the sentences served concurrently or consecutively.

24 I understand that if more than one sentence of imprisonment is imposed and I am
25 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
26 the sentences served concurrently or consecutively.

27 I also understand that information regarding charges not filed, dismissed charges, or
28 charges to be dismissed pursuant to this agreement may be considered by the judge at

1 sentencing.

2 I have not been promised or guaranteed any particular sentence by anyone. I know
3 that my sentence is to be determined by the Court within the limits prescribed by statute.

4 I understand that if my attorney or the State of Nevada or both recommend any
5 specific punishment to the Court, the Court is not obligated to accept the recommendation.

6 I understand that if the State of Nevada has agreed to recommend or stipulate a
7 particular sentence or has agreed not to present argument regarding the sentence, or agreed
8 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor
9 when the offense could have been treated as a felony, such agreement is contingent upon my
10 appearance in court on the initial sentencing date (and any subsequent dates if the sentencing
11 is continued). I understand that if I fail to appear for the scheduled sentencing date or I
12 commit a new criminal offense prior to sentencing the State of Nevada would regain the full
13 right to argue for any lawful sentence.

14 I understand if the offense(s) to which I am pleading guilty to was committed while I
15 was incarcerated on another charge or while I was on probation or parole that I am not
16 eligible for credit for time served toward the instant offense(s).

17 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
18 United States, I may, in addition to other consequences provided for by federal law, be
19 removed, deported, excluded from entry into the United States or denied naturalization.

20 I understand that the Division of Parole and Probation will prepare a report for the
21 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
22 sentencing, including my criminal history. This report may contain hearsay information
23 regarding my background and criminal history. My attorney and I will each have the
24 opportunity to comment on the information contained in the report at the time of sentencing.
25 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
26 may also comment on this report.

27 WAIVER OF RIGHTS

28 By entering my plea of guilty, I understand that I am waiving and forever giving up

1 the following rights and privileges:

2 1. The constitutional privilege against self-incrimination, including the right to refuse
3 to testify at trial, in which event the prosecution would not be allowed to comment to the
4 jury about my refusal to testify.

5 2. The constitutional right to a speedy and public trial by an impartial jury, free of
6 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
7 assistance of an attorney, either appointed or retained. At trial the State would bear the
8 burden of proving beyond a reasonable doubt each element of the offense charged.

9 3. The constitutional right to confront and cross-examine any witnesses who would
10 testify against me.

11 4. The constitutional right to subpoena witnesses to testify on my behalf.

12 5. The constitutional right to testify in my own defense.

13 6. The right to appeal the conviction, with the assistance of an attorney, either
14 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional
15 or other grounds that challenge the legality of the proceedings and except as otherwise
16 provided in subsection 3 of NRS 174.035.

17 VOLUNTARINESS OF PLEA

18 I have discussed the elements of all of the original charge(s) against me with my
19 attorney and I understand the nature of the charge(s) against me.

20 I understand that the State would have to prove each element of the charge(s) against
21 me at trial.

22 I have discussed with my attorney any possible defenses, defense strategies and
23 circumstances which might be in my favor.

24 All of the foregoing elements, consequences, rights, and waiver of rights have been
25 thoroughly explained to me by my attorney.

26 I believe that pleading guilty and accepting this plea bargain is in my best interest,
27 and that a trial would be contrary to my best interest.

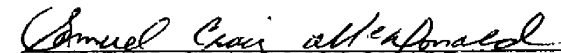
28 I am signing this agreement voluntarily, after consultation with my attorney, and I am

1 not acting under duress or coercion or by virtue of any promises of leniency, except for those
2 set forth in this agreement.

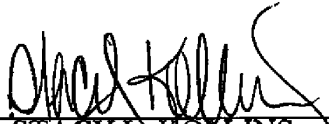
3 I am not now under the influence of any intoxicating liquor, a controlled substance or
4 other drug which would in any manner impair my ability to comprehend or understand this
5 agreement or the proceedings surrounding my entry of this plea.

6 My attorney has answered all my questions regarding this guilty plea agreement and
7 its consequences to my satisfaction and I am satisfied with the services provided by my
8 attorney.

9 DATED this 15th day of December, 2005.

10 
11 SAMUEL CRAIG MCDONALD
12 Defendant

13 AGREED TO BY:

14 
15 STACY L. ROLLINS
16 Deputy District Attorney
17 Nevada Bar #005391
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1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
to which Alford pleas are being entered.

5 2. I have advised the Defendant of the penalties for each charge and the restitution
6 that the Defendant may be ordered to pay.

7 3. All pleas of Alford offered by the Defendant pursuant to this agreement are
consistent with the facts known to me and are made with my advice to the Defendant.

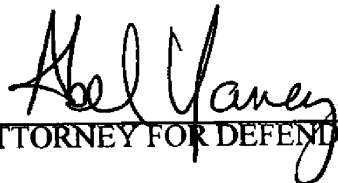
8 4. To the best of my knowledge and belief, the Defendant:

9 a. Is competent and understands the charges and the consequences of pleading
10 Alford as provided in this agreement.

11 b. Executed this agreement and will enter all Alford pleas pursuant hereto
voluntarily.

12 c. Was not under the influence of intoxicating liquor, a controlled substance or
13 other drug at the time I consulted with the Defendant as certified in paragraphs
1 and 2 above.

14 Dated: This 15th day of December, 2005.

15 
16 ATTORNEY FOR DEFENDANT

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28 ct/SVU

Shirley Stangor
CLERK

1 **INFOSA**
2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
5 **STACY L. KOLLINS**
6 Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 12/15/05
13 9:00 A.M.
14 PD A. YANEZ

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 SAMUEL CRAIG MCDONALD,
19 #1753770

20 Defendant.

Case No: C217360
Dept No: XX

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 DAVID ROGER, District Attorney within and for the County of Clark, State of
24 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That SAMUEL CRAIG MCDONALD, the Defendant(s) above named, having
26 committed the crimes of **LEWDNESS WITH A CHILD UNDER THE AGE OF 14**
27 (Category A, Felony - NRS 201.230); and **ATTEMPT SEXUAL ASSAULT WITH A**
28 **MINOR UNDER SIXTEEN YEARS OF AGE** (Category B, Felony - NRS 193.330,
200.364, 200.366), on or between March 1, 2004 and August 9, 2005, within the County of
Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made
and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did then and there wilfully, lewdly, unlawfully, and feloniously commit a lewd or
lascivious act with the body of DOMINISHA WARD and/or AMARI SMITH and/or

EXHIBIT "1"

1 KIARRA SMITH, a child under the age of fourteen years, by rubbing and/or touching the
2 anal opening of the said DOMINISHA WARD and/or AMARI SMITH and/or KIARRA
3 SMITH with his penis, with the intent of arousing, appealing to, or gratifying the lust,
4 passions, or sexual desires of said Defendant, or said child.

5 COUNT 2 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN
6 YEARS OF AGE

7 did then and there wilfully, unlawfully, and feloniously attempt to sexually assault
8 and subject DOMINISHA WARD and/or AMARI SMITH and/or KIARRA SMITH, female
9 children under sixteen years of age, to sexual penetration, to-wit: anal intercourse, by the
10 Defendant attempting to insert his penis into the anal opening of the said DOMINISHA
11 WARD and/or AMARI SMITH and/or KIARRA SMITH, against their will, or under
12 conditions in which Defendant knew, or should have known, that the said DOMINISHA
13 WARD and/or AMARI SMITH and/or KIARRA SMITH were mentally or physically
14 incapable of resisting or understanding the nature of Defendant's conduct.

15
16 DAVID ROGER
17 DISTRICT ATTORNEY
18 Nevada Bar #002781

19 BY /s/ Stacy L. Kollins
20 STACY L. KOLLINS
21 Deputy District Attorney
22 Nevada Bar #005391
23
24
25

26 DA#05FN1441X/ct/SVU
27 NLVPD EV#0520339
28 LEWD W/CHILD U/14;
ATT SEX ASSLT U/16 - F
(TK3)

ORIGINAL

FILED

FEB 8 11 26 AM '06

Liberty E. Rungius
CLERK

JOCP
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

SAMUEL CRAIG MCDONALD,
#1753770

Defendant.

Case No: C217360

Dept No: XX

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of **COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A, Felony)**, in violation of NRS 201.230; and **COUNT 2 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category B, Felony)**, in violation of NRS 193.330, 200.364, 200.366, pursuant to Alford plea; thereafter, on the 31st day of January, 2006, the Defendant was present in court for sentencing with his counsel, ABEL M. YANEZ, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee, and the \$150.00 DNA Analysis fee including testing to determine genetic markers, the Defendant is sentenced as follows: to

COUNT 1 - LIFE in the Nevada Department of Corrections (NDC) with the possibility of parole beginning when a minimum of TEN (10) YEARS is served, and

Exhibit 3

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FEB 8 2006

CLERK

COUNTY CLERK

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COUNT 2 - to a MAXIMUM of ONE HUNDRED & EIGHTY (180) MONTHS and
a MINIMUM of TWENTY-FOUR (24) MONTHS in NDC. Sentence in Count 2
CONSECUTIVE to sentence in Count 1, with TWO (2) DAYS credit for time served.

COURT FURTHER ORDERED, Lifetime Supervision to commence upon release
from any term of probation, parole, or imprisonment. Deft. shall register as a sex offender
within 48 hours of sentencing or release from custody. Deft. REMANDED to custody.

DATED this 6 day of February, 2006.


DISTRICT JUDGE

cf

ct/SVU

CASE: 05020339
DATE: 8/20/05
TIME: 23:04

---NORTH LAS VEGAS POLICE DEPARTMENT--- REF: ORIGINAL
-----POLICE REPORT----- PAGE: 4
-----NARRATIVE PORTION----- OF: 4

ON 08-18-05 I RESPONDED TO SUNRISE HOSPITALPEDIATRIC EMERGENCY ROOM SCAN UNIT REFERENCE A SEXUAL ASSAULT TO TWO MINORS. I CONTACTED THE MOTHER OF THE CHILDREN, TUWANNA SMITH WHO TOLD ME THE FOLLOWING: ON 08-16-05 HER ELEVEN YEAR OLD DAUGHTER DOMINISHA WARD CAME TO HER AND ASKED IF SHE STILL LIKED SAM (SAMUEL MCDONALD). TUWANNA TOLD HER YES. DOMINISHA TOLD SAM WAS NASTY AND TOLD HER MOTHER SHE NEEDED TO TALK TO AMARI AND KIARRA, HER LITTLE BROTHER AND SISTER. TUWANNA ASKED AMARI AND KIARRA IF THEY NEEDED TO TELL HER ANYTHING. KIARRA TOLD AMARI TO GO FIRST. AMARI TOLD HIS MOTHER THAT SAM PUT HIS WEE WEE IN HIS BUT. KIARRA TOLD HER MOTHER HE DID THE SAME THING TO ME. TUWANNA ASKED WHEN THIS HAPPENED AND THE CHILDREN TOLD HER, LAST TUESDAY WHEN SHE WAS NEXT DOOR, THIS WOULD HAVE BEEN 08-09-05.

TUWANNA CONTACTED SUNRISE HOSPITAL AND WAS GIVEN AN APPOINTMENT FOR A SCAN EXAMINE. TUWANNA TOLD ME THERE ARE FOUR SMALL CHILDREN LIVING IN THE HOUSE. DOMINISHA WARD AGE 11, ERNEST BENFORD AGE 4, AMARI SMITH AGE 9, AND KIARRA SMITH AGE 6.

I REQUESTED THAT ALL THE CHILDREN BE EXAMINED AND A FORENSIC INTERVIEW BE CONDUCTED BY PEDIATRIC DOCTOR N. METHA. DR. METHA INTERVIEWED ALL FOUR CHILDREN AND TOLD ME THE FOLLOWING: DOMINISHA WARD TOLD HER SAM HAD PUT HIS FINGER IN HER BUT ONE NIGHT WHILE DRIVING TO THE STORE. SHE SAID SAM PULLED OVER TO THE SIDE OF THE ROAD AND PULLED HER PANTS DOWN AND STUCK HIS HAND INTO HER PANTIES.

SAM TOLD HER SHE WOULD GET A WHIPPING IF SHE TOLD ANYONE. AMARI SMITH TOLD DR. METHA THAT SAM DOSE GAY THING TO HIM. WHEN ASKED TO EXPLAIN HE TOLD HER, SAM PUTS HIS THING IN HIS BUTT AND IT HURTS. HE ALSO TOLD DR. METHA THAT SAM USED GREASE WHEN HE DID THIS. KIARA TOLD DR. METHA THAT SAM TOUCHES HER FRONT AND BACK PRIVATES. SHE ALSO SAID SAM USED GREASE ON HER BUTT AND IT FELT NASTY. ERNEST MADE NO DISCLOSURES. DR. METHA'S FULL SCAN EXAMINATION REPORT IS WORTHCOMING FOR FULL DETAILS OF THE INTERVIEWS.

TUWANNA SMITH TOLD ME SHE REPORTED THE INCIDENT WHERE SAM ALLEDGELLY TOUCH DOMINISHA AND THE CHARGE WAS UNFOUNDED.

A SCOPE CHECK OF SAMUEL MCDONALD REVEALED HE IS A TWO TIME REGISTERED SEX OFFENDER.

ON 08-19-05 I CONTACTED SAMUEL MCDONALD AT 4700 ENERGIZER WAY (DESERT GLASS) BASED ON THE FORENSIC INTERVIEW DISCLOSURES MADE BY AMARI AND KIARRA SMITH I PLACED SAM MCDONALD UNDER ARREST FOR SEXUAL ASSAULT OF A MINOR UNDER 14, TWO COUNTS. SAM WAS TRANSPORTED TO THE NLVDC AND BOOKED. ATTACHMENTS: BOOKING SHEET.

records bureau processed
SCARFF/DENISE

ser no ! detective bureau processed
1259 !

ser no

supervisor approving
LAROTONDA/CHRISTOPHER

ser no ! officer reporting
0517 ! WATSON/JIMMY RAY

S

ser no
0995

Exhibit 4



1 ORDR
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 11642
6 **PUBLIC DEFENDERS OFFICE**
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 Tegan.Machnich@clarkcountynv.gov
12 *Attorneys for Defendant*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 THE STATE OF NEVADA,)	
)	
16 Plaintiff,	)	CASE NO. C-18-334954-1
)	
17 v.	)	DEPT. NO. X
)	
18 SAMUEL MCDONALD,)	
)	
19 Defendant,)	
20)	

21 **ORDER FOR WRIT OF HABEAS CORPUS**

22 The Petition of SAMUEL MCDONALD submitted by TEGAN C. MACHNICH, Deputy
23 Public Defender, as attorney for the above-captioned individual, having been filed in the above-
24 entitled matter,

25 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that you, STEVEN
26 GRIERSON, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for the
27 County of Clark, issue a Writ of Habeas Corpus.

28 DATED AND DONE at Las Vegas, Nevada, this 8 of November, 2018.


DISTRICT COURT JUDGE

Submitted By:
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: 
TEGAN C. MACHNICH, #11642
Deputy Public Defender

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District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office

Dept. No.: X

Steven D. Grierson

1 WRTH
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 11642
6 **PUBLIC DEFENDERS OFFICE**
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 Tegan.Machnich@clarkcountynv.gov
12 *Attorneys for Defendant*

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-18-334954-1
)	
v.	)	DEPT. NO. X
)	
SAMUEL MCDONALD,)	
ID #1753770	)	DATE: November 14, 2018
Defendant,	)	TIME: 8:30 a.m.

WRIT OF HABEAS CORPUS

To: Clark County Sheriff
Clark County, Nevada

GREETINGS:

We command that you have the body of the above-captioned person, by you imprisoned and detained, as it is alleged, together with the time and cause of such imprisonment and detention, by whatever name said above-captioned person shall be called or charged, before the Honorable Tierra D Jones, District Court Judge, at his/her chambers or his/her courtroom in the County Courthouse Building in the City of Las Vegas, County of Clark, State of Nevada, on November 14, 2018 at the hour of 8:30 am, to do and receive that which shall then and there be considered concerning the said above-captioned person, and have you then and there this Writ.

DATED AND DONE this 13 of November, 2018.

STEVEN GRIERSON, CLERK OF THE COURT

By: *[Signature]*
DEPUTY

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District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

CERTIFICATE OF FACSIMILE TRANSMISSION

CLARK COUNTY DETENTION CENTER
FAX #702-671-3763

Case Name: SAMUEL MCDONALD
Case No.: C-18-334954-1
Dept. No. X



1 PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
2 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
3 **PUBLIC DEFENDERS OFFICE**
309 South Third Street, Suite 226
4 Las Vegas, Nevada 89155
Telephone: (702) 455-4685
5 Facsimile: (702) 455-5112
Tegan.Machnich@clarkcountynv.gov
6 *Attorneys for Defendant*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)
10 Plaintiff,)
11 v.)
12 SAMUEL MCDONALD,)
13 Defendant,)

CASE NO. C-18-334954-1
DEPT. NO. X
DATE: November 14, 2018
TIME: 8:30 a.m.

14
15 **OPPOSITION TO STATE'S MOTION TO ADMIT**
16 **EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS**

17 COMES NOW, the Defendant, SAMUEL MCDONALD, by and through TEGAN C.
18 MACHNICH, Chief Deputy Public Defender and hereby requests this Honorable Court deny the
19 State's motion.

20 This Motion is made and based upon all the papers and pleadings on file herein, the
21 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

22 DATED this 13th day of November, 2018.

23 PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

24
25 By: /s/Tegan C. Machnich
26 TEGAN C. MACHNICH, #11642
27 Deputy Public Defender
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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 Defendant Samuel McDonald is awaiting trial on two counts of Sexual Assault with a
4 Minor under the Age of Fourteen. The State has alleged that Mr. McDonald forced his
5 girlfriend's brother, a nine year old named S.B., to perform fellatio on him and engage in anal
6 intercourse on or about December 28, 2001. The State is seeking to introduce sexual acts that
7 allegedly occurred in 2004 and 2005, involving different minor children. Mr. McDonald
8 ultimately pled guilty in the subsequent case to Lewdness with a Child under the Age of 14 and
9 Attempt Sexual Assault with a Minor Under Sixteen Years of Age naming the three minor
10 children. Conveniently omitted from the State's procedural history is the fact that the guilty plea
11 was entered pursuant to Alford v. State.

12 **LEGAL ARGUMENT**

13 The State seeks to introduce a series of sexual acts allegedly committed against three
14 minor children, D.W., A.S. and K.S. from a case initiated in October 2005, over four years after
15 the allegations here. The Defense does not know specifically what acts the State seeks to
16 introduce, as the State includes a litany of charges contained in the prior case, a few specific
17 "disclosures" allegedly made by the children without citation to a police report, and the guilty
18 plea agreement Mr. McDonald entered **pursuant to the Alford decision**. Thus, and for the
19 forthcoming reasons, the State's Motion should be denied for all proffered bad acts.

20 **A. The Proposed Bad Act Evidence is Not Admissible Under NRS 48.045(2)**

21 NRS 48.045(2) allows the admission of bad act evidence but only for relevant purposes
22 other than to prove that the defendant acted in conformity therewith (propensity evidence). The
23 State relies upon California cases, NRS 48.045(3) and the definitions included in NRS 179D.097
24 in support of its assertion that acts involving D.W., A.S. and K.S. should be admissible under
25 NRS 48.045(2). That is simply untrue.

1 **B. The Recent Amendment to NRS 48.045 Does Not Allow For Propensity Evidence**

2 In its Motion, the State argues that the recent amendments to NRS 48.045(3) permit
3 Courts to “admit evidence of prior instances of sexual conduct to show that a defendant acted in
4 conformity with their past actions.” See Motion in Limine, pp 4-7. In support of this contention,
5 the State cites to numerous extra-jurisdictional sources (chiefly from the State of California),
6 none of which has precedential value here in Nevada. While NRS 48.045(3) may represent a
7 change in the law regarding the possible admissibility of prior sex offenses, it does not say that
8 prior sex offenses may now be admitted to prove that a defendant, “acted in conformity
9 therewith.” This argument by the State is directly forbidden under Nevada case law. See, e.g.,
10 Roever v. State, 114 Nev. 867 (1998), Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). In
11 Braunstein, a sexual assault on a minor case, the Nevada Supreme Court noted:
12

13 “**This court has generally held inadmissible prior acts that are remote in time and**
14 **involve conduct different from the charged conduct. This court has stated that the**
15 **use of uncharged bad acts is heavily disfavored and is likely to be prejudicial or**
16 **irrelevant. Prior bad act evidence forces the accused to defend himself against**
17 **vague and unsubstantiated charges and may result in a conviction because the jury**
18 **believes the defendant to be a bad person. Thus, using uncharged bad acts to**
show criminal propensity is forbidden and is commonly viewed as grounds
for reversal.” Id. at 73 (emphasis added) (internal citations omitted).

19 Braunstein is still controlling law and unless or until it is overturned, bad act evidence is not
20 admissible to prove propensity. All that the amendment to NRS 48.045(3) did was make the
21 evidence of prior sexual misconduct *presumptively* admissible. It still does not come in for the
22 sole purpose of proving propensity. Further, even if this Honorable Court finds that the evidence
23 proffered by the State meets the necessary requirements of NRS 48.045(2) or (3), the evidence
24 must still be excluded because its probative value is substantially outweighed by the danger of
25 unfair prejudice and/or the allegations have not been proven by clear and convincing evidence.
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1 **i. Several of these bad acts would be excluded even in jurisdictions that allowed**
2 **for propensity evidence.**

3 The State cites to a host of California based cases for supporting the admission of bad act
4 evidence in Mr. McDonald's case. However, even in jurisdictions where sexual propensity
5 evidence is admissible, courts typically exclude evidence of prior sexual offenses that are
6 qualitatively different from the charged offenses, where the victims were different ages, and
7 where the offenses occurred remotely in time. See, e.g., People v. Abilez, 41 Cal.4th 472, 498–
8 502, 161 P.3d 58, 78–81 (2007), as modified (Aug. 22, 2007) (in a 1997 prosecution for sodomy
9 and murder of an elderly woman, a 1973 juvenile adjudication for attempted unlawful
10 intercourse with a minor was too remote to be admitted at trial); State v. Salazar, 181 Ariz. 87,
11 887 P.2d 617 (1994) (in prosecution for attempted molestation of defendant's 13-year-old niece,
12 evidence that defendant raped a 19-year-old woman 18 years previously was inadmissible to
13 show propensity for sexual aberration); Jandres, 226 Cal.App.4th at 356, 171 Cal.Rptr.3d at 862-
14 63 (in prosecution for kidnapping and forcible rape of 18-year-old, evidence that defendant had
15 broken into an 11-year-old girl's home and touched her was inadmissible propensity evidence);
16 see also People v. Earle, 172 Cal.App.4th 372, 396–400, 91 Cal. Rptr. 3d 261, 280–83 (2009)
17 (prior commission of indecent exposure does not rationally support an inference that the
18 perpetrator has a propensity to commit felony sexual assault). Thus, even if Nevada did allow for
19 propensity type evidence, some (if not all) of these bad acts would be excluded.

20 In People v. Earle, a California appellate court explained that the California Evidence
21 Code Section 1108 (which the State alleges NRS 48.045(3) is modeled after), requires that the
22 uncharged bad act must “still share the same essential nature as the conduct underlying the
23 charged offense.” Earle, 172 Cal.App.4th at 397–98, 91 Cal.Rptr.3d at 281. In Earle, the Court
24 refused to allow bad act evidence of indecent exposure in a trial for rape. The Court noted:
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1 The statute would clearly authorize the admission of evidence of an indecent
2 exposure in a second prosecution for indecent exposure, on the rationale that the
3 defendant's commission of the first crime supports an inference that he is
4 predisposed to such conduct, and that since it shared the same essential nature as
the conduct underlying the charged offense, its occurrence increased the
likelihood that the defendant committed that offense.

5 However, the statute cannot infuse an uncharged offense with relevance or
6 probative value it cannot rationally be found to possess. In order for evidence of
7 another crime to be relevant under Evidence Code section 1108, it must have
8 some tendency in reason to show that the defendant is predisposed to engage in
conduct of the type charged. . . If the uncharged crime does not rationally support
such an inference, then it is simply irrelevant in a prosecution for the charged one.

9 Does the commission of indecent exposure rationally support an inference that the
10 perpetrator has a propensity or predisposition to commit rape? Not without some
11 kind of expert testimony, it doesn't. Id.

12 As in Earle, the State is improperly seeking to use evidence of Mr. McDonald doing a variety of
13 acts to D.W. and K.S., including touching the girls' private areas, to show his propensity to
14 commit fellatio and anal sex with a male child in this case. Similarly, the timing is remote – the
15 instant offense having allegedly occurred in 2001 and the “prior” acts having occurred in 2005.
16 Thus, even under the California Evidence Code Section 1108, these bad acts would be
17 inadmissible.

18
19 **C. The Probative Value of the Bad Act Evidence is Substantially Outweighed by the**
20 **Risk of Unfair Prejudice**

21 The State alleges that the evidence in question is highly probative because of the “breadth
22 and scope of his sexual abuse of children” and that “a jury is entitled to know that his behavior in
23 this case...is not an isolated event.” See State’s Motion, p.7. This is simply not true.

24 The State goes on to say that no prejudicial/probative analysis is required. However the
25 State’s own statements bely their intent. If this argument is correct, then this just shows how
26 great the risk is for unfair prejudice. If the jury is entitled to receive prior bad act evidence to
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1 know that the acts at issue have repeatedly occurred, as is the State's argument, then this shows
2 that the jury will likely convict Mr. McDonald not based on the evidence of this case, but rather
3 because they think he is a sexual predator. This is exactly the type of unfair prejudice that is
4 prohibited by Nevada law. See Braunstein at 73.

5 The risk of unfair prejudice is great and substantially outweighs any probative value.
6 Admitting the evidence involving D.W., E.B., A.S., and K.S. paints Mr. McDonald as a sexual
7 predator and the jury will want nothing more than to convict him just based on the bad act
8 evidence. The risk of unfair prejudice is further increased by the fact that the charges against Mr.
9 McDonald are extremely remote in time.

11 **D. All Bad Act Evidence Must be Proven by Clear and Convincing Evidence**

12 The State chooses to completely overlook the necessity of proving bad acts by "clear and
13 convincing evidence" prior to allowing them at trial. Tinch v. State, 113 Nev. 1170 (1997). Mr.
14 McDonald's prior plea was pursuant North Carolina v. Alford. See 400 U.S. 25 (1970).
15 Therefore, explicit in that guilty plea agreement, is the understanding that Mr. McDonald type of
16 plea "does not require [him] to admit guilt, but is based upon [his] belief that the State would
17 present sufficient evidence at trial that a jury would return a verdict of guilty of a greater
18 offense." See State's Motion, Attachment. By nature of his plea, Mr. McDonald has not admitted
19 guilt to any of the proffered "bad act" offenses.

21 If this Honorable Court finds that the bad acts are admissible pursuant to NRS 48.045(2)
22 or (3), and the probative value is not substantially outweighed by the risk of unfair prejudice, a
23 hearing outside of the presence of the jury must be held to determine if the bad acts can be
24 proven by clear and convincing evidence. Defense respectfully requests that this hearing take
25 place at least thirty days before trial as the admission of this evidence would significantly change
26 the atmosphere of the case.

1
2 **CONCLUSION**

3 All of the bad acts presented by the State are prohibited from being introduced under
4 NRS 48.045(2) and/or (3). Further, any probative value the evidence has is substantially
5 outweighed by the risk of unfair prejudice. Lastly, any bad act evidence must first be proven by
6 clear and convincing evidence. If this Court deems the bad act evidence to be theoretically
7 admissible, a hearing is required.
8

9 DATED this 13th day of November, 2018.

10 PHILIP J. KOHN
11 CLARK COUNTY PUBLIC DEFENDER

12 By: /s/Tegan C. Machnich
13 TEGAN C. MACHNICH, #11642
14 Deputy Public Defender
15
16

17 **CERTIFICATE OF ELECTRONIC SERVICE**

18 I hereby certify that service of the above and forgoing Opposition to State's Motion to
19 Admit Evidence of Other Crimes, Wrongs, or Acts was served via electronic e-filing to the Clark
20 County District Attorney's Office on this 13th day of November, 2018.
21

22 District Attorney's Office
23 E-Mail Address:
24 Jennifer.Georges@clarkcountyda.com

25 By: /s/ Annie McMahan
26 An employee of the
27 Clark County Public Defender's Office
28



1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0556
3 TEGAN C. MACHNICH
4 NEVADA BAR NO. 11642
5 **PUBLIC DEFENDERS OFFICE**
6 309 South Third Street, Suite 226
7 Las Vegas, Nevada 89155
8 Telephone: (702) 455-4685
9 Facsimile: (702) 455-5112
10 Tegan.Machnich@clarkcountynv.gov
11 *Attorneys for Defendant*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 v.)

12 SAMUEL MCDONALD,)

13 Defendant,)
14 _____)

CASE NO. C-18-334954-1

DEPT. NO. X

DATE: December 10, 2018
TIME: 8:30 a.m.

15 **MOTION TO DISMISS DUE TO STATUTE OF LIMITATIONS**

16 COMES NOW, the Defendant, SAMUEL MCDONALD, by and through TEGAN
17 MACHNICH, Chief Deputy Public Defender and hereby moves to dismiss due to the statute of
18 limitations having run.

19 This Motion is made and based upon all the papers and pleadings on file herein, the
20 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

21 DATED this 27th day of November, 2018.

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24 By: /s/ Tegan C. Machnich
25 TEGAN C. MACHNICH, #11642
26 Deputy Public Defender
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1 **II. UNDER THE 2001 LAW, THIS CASE IS BARRED FROM PROSECUTION BY THE STATUTE OF**
2 **LIMITATIONS**

3 NRS 171.095 is the statute which delineates the statute of limitations on child sex abuse
4 cases. In 2001, NRS 171.095 read as follows:

5 1. Except as otherwise provided in subsection 2 and NRS 171.083
6 and 171.084:

7 (a) If a felony, gross misdemeanor or misdemeanor is committed
8 in a secret manner, an indictment for the offense must be
9 found, or an information or complaint filed, within the periods
10 of limitation prescribed in NRS 171.085 and 171.090 and
11 section 3 of this act after the discovery of the offense, unless a
12 longer period is allowed by paragraph (b) or the provisions of
13 NRS 202.885.

14 (b) An indictment must be found, or an information or complaint
15 filed, for any offense constituting sexual abuse of a child, as
16 defined in NRS 432B.100, before the victim of the sexual
17 abuse is:

18 (1) **Twenty-one years old** if he discovers or reasonably should
19 have discovered that he was a victim of the sexual abuse by
20 the date on which he reaches that age; or

21 (2) Twenty-eight years old if he does not discover and
22 reasonably should not have discovered that he was a victim
23 of the sexual abuse by the date on which he reaches 21
24 years of age.

25 2. If any indictment found, or an information or complaint filed,
26 within the time prescribed in subsection 1 is defective so that no
27 judgment can be given thereon, another prosecution may be
28 instituted for the same offense within 6 months after the first is
 abandoned.

 NRS 171.095, 2005 Nevada Laws Ch. 331 (A.B. 501) (emphasis added).

 NRS 171.095 was amended effective October 1, 2013 to extend the time period from
when the victim turned twenty-one years old to when a victim turns thirty-six years of age. The
legislative history of NRS 176.095, at the time it was enacted on May 23, 2013, further states

1 that “the amendatory provisions of this act apply to a person who: 1. Committed the sexual abuse
2 of a child, as defined in NRS 432B.100, before October 1, 2013, if the applicable period of
3 limitation has commenced but has not yet expired on October 1, 2013.” See *id.*

4 Thus, this motion comes down to a simple math problem:

5 S.B. was born in **September 1992**.

6 S.B. disclosed the alleged abuse in **December 2001** – subsection 1(b)(1) is the applicable
7 law here.
8

9 S.B. turned 21 in **September 2013**.

10 Thus, the Statute of Limitations ran in **September 2013**.

11 The extension would only apply if the Statute of Limitations had not expired by **October**
12 **1, 2013**. Thus the **extension does not apply**.

13 As the Nevada Supreme Court explained in Houtz v. State, “The Nevada Legislature has
14 never included child sexual abuse among those offenses which have no statute of limitations for
15 prosecution.” and “This court construes exemptions to criminal statutes of limitations in the light
16 most favorable to the accused,” Houtz v. State, 111 Nev. 457, 461–62, 893 P.2d 355, 358 (1995);
17 citing State v. Merolla, 100 Nev. 461, 464, 686 P.2d 244, 246 (1984). In Houtz, the alleged
18 victim reported his alleged sexual assault when he was twenty-five years old. The Nevada
19 Supreme Court held that, “...although Houtz’ crime was committed in a secret manner, the
20 statute of limitations had run by the time the State initiated prosecution.” *Id.* The Supreme Court
21 reversed the district court’s decision to deny the motion to dismiss.
22

23 In this case, a complaint needed to be filed prior to S.B. turning 21 years old. S.B. was 26
24 years old when the Indictment was filed. Further, the SOL had run prior to the October 1, 2013
25 deadline; no extension applies in this case. Thus, just as in Houtz, the statute of limitations here
26 had run by the time the State initiated prosecution.
27
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CONCLUSION

S.B. was over the age of 21 when the Indictment was filed in this case. Pursuant to the 2001 version of NRS 171.095, the statute of limitations had already run when the Indictment was filed. As such, the defense moves for dismissal of all charges.

DATED this 27th day of November, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Chief Deputy Public Defender

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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion to Dismiss Due to Statute of Limitations on for hearing before the Court on the 10th day of December, 2018, at 8:30 a.m. in Department X of the District Court.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JACOB J. VILLANI
6 Chief Deputy District Attorney
7 Nevada Bar #011732
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,
10
11 Plaintiff,

11 -vs-

12 **SAMUEL MCDONALD,**
13 **#1753770**

14 Defendant.

CASE NO: **C-18-334954-1**

DEPT NO: **X**

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
16 **DUE TO STATUTE OF LIMITATIONS**

17 DATE OF HEARING: DECEMBER 10, 2018
18 TIME OF HEARING: 8:30 A.M.

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
19 District Attorney, through JACOB J. VILLANI, Chief Deputy District Attorney, and hereby
20 submits the attached Points and Authorities in Opposition to Defendant's Motion to Dismiss
21 Due to Statute of Limitations.

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

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1 **POINTS AND AUTHORITIES**

2 **PROCEDURAL HISTORY**

3 On September 19, 2018, the State of Nevada (“State”) filed an Indictment charging
4 Defendant Samuel McDonald (“Defendant”) with Counts 1 and 2 – Sexual Assault with a
5 Minor Under Fourteen Years of Age (one count each for anal and oral penetration).

6 On October 10, 2018, Defendant was arraigned, pleaded not guilty, invoked the 60-day
7 rule, and his trial was set to begin on December 10, 2018.

8 On October 29, 2018, Defendant filed a Petition for Writ of Habeas Corpus.

9 On November 14, 2018, the Court heard argument on Defendant’s Petition, at which
10 time Defendant affirmatively waived his 60-day trial right on the record. The Court reset
11 Defendant’s trial to begin on March 4, 2019.

12 On November 1, 2018, the State filed a Motion in Limine to Admit Evidence of Other
13 Crimes, Wrongs or Acts that Constitute Separate Sexual Offenses.

14 On November 16, 2018, this Court denied both Defendant’s Petition for Writ of Habeas
15 Corpus and State’s Motion in Limine to Admit Evidence of Other Crimes, Wrongs or Acts
16 that Constitute Separate Sexual Offenses via minute order.

17 On November 27, 2018, Defendant filed the instant Motion to Dismiss Due to Statute
18 of Limitations.

19 **STATEMENT OF FACTS**

20 On December 28, 2001, S.B. was nine years old and staying with Defendant at a place
21 near University Medical Center. On that date, Defendant orally and anally penetrated S.B.
22 with his penis. The rape lasted about 15 to 20 minutes, and S.B. told his mother about it when
23 she got home. S.B.’s mother took him to UMC where a nurse took a Sexual Assault Kit
24 (“SAK”) including intimate swabs. After he got the SAK, the next thing S.B. was able to
25 remember was being told by his family Defendant “did it to another little girl and got 30 years.”
26 S.B. believed that his mother was following up with his case.

27 In March of 2017, as a result of funding received pursuant to the Sexual Assault Kit
28 Initiative (“SAKI”) grant to test all untested rape kits, S.B.’s SAK (which had gone untested)

1 was tested by Bode Cellmark Forensics. An unknown male DNA profile was developed from
2 the sperm fraction of S.B.'s rectal swabs and uploaded into the Combined DNA Index System
3 ("CODIS").

4 On August 14, 2017, LVMPD received a CODIS hit returning to Defendant. On
5 January 18, 2018, LVMPD detectives executed a search warrant and obtained a buccal swab
6 from Defendant. The buccal swab obtained was compared to the unknown DNA profile
7 developed by Bode Cellmark Forensics. LVMPD's forensic lab determined that the DNA
8 profile from Defendant's buccal matched the DNA profile from S.B.'s SAK rectal swabs. The
9 possibility of randomly selecting an unrelated individual from the general population having
10 a DNA profile that is consistent with Defendant's DNA profile is approximately 1 in 16.4
11 trillion.

12 LEGAL ARGUMENT

13 **THERE IS NO STATUTE OF LIMITATIONS FOR SEXUAL ASSAULT IN** 14 **NEVADA IF THERE IS A TIMELY REPORT TAKEN BY LAW ENFORCEMENT**

15 Defendant claims that the statute of limitations has run in this case because the statute
16 of limitations prevents the case from being prosecuted due to the delay in filing. Defendant's
17 analysis regarding the statute of limitations is incorrect at best, and willfully deceptive to this
18 Court at worst.

19 NRS 171.083 provides:

- 20 **1. If, at any time during the period of limitation** prescribed in NRS 171.085
21 **and 171.095, a victim of a sexual assault, a person authorized to act on**
22 **behalf of a victim of a sexual assault, or a victim of sex trafficking or a**
23 **person authorized to act on behalf of a victim of sex trafficking, files with**
24 **a law enforcement officer a written report concerning the sexual assault**
25 **or sex trafficking, the period of limitation** prescribed in NRS 171.085 and
26 **171.095 is removed and there is no limitation of the time within which**
27 **a prosecution for the sexual assault or sex trafficking must be**
28 **commenced.**
2. If a written report is filed with a law enforcement officer pursuant to
subsection 1, the law enforcement officer shall provide a copy of the written
report to the victim or the person authorized to act on behalf of the victim.
3. If a victim of a sexual assault or sex trafficking is under a disability during
any part of the period of limitation prescribed in NRS 171.085 and 171.095
and a written report concerning the sexual assault or sex trafficking is not
otherwise filed pursuant to subsection 1, the period during which the victim

1 is under the disability must be excluded from any calculation of the period
2 of limitation prescribed in NRS 171.085 and 171.095.

3 4. For the purposes of this section, a victim of a sexual assault or sex
4 trafficking is under a disability if the victim is insane, intellectually
5 disabled, mentally incompetent or in a medically comatose or vegetative
6 state.

7 5. As used in this section, "law enforcement officer" means:

- 8 (a) A prosecuting attorney;
9 (b) A sheriff of a county or the sheriff's deputy;
10 (c) An officer of a metropolitan police department or a police department of
11 an incorporated city; or
12 (d) Any other person upon whom some or all of the powers of a peace
13 officer are conferred pursuant to NRS 289.150 to 289.360, inclusive.

14 NRS 171.083 provides (and has provided since 1997) that there is no statute of limitations for
15 sexual assault so long as a report was filed within the applicable statute of limitations. As
16 noted, *supra*, S.B. immediately reported this rape when it happened in 2001, and a police
17 report was generated at that time.

18 In his motion, Defendant argues that the time period for the filing of offenses
19 constituting sexual abuse of a child apply to his case under NRS 171.095. This argument fails
20 to address NRS 171.083, *supra*. In fact, NRS 171.095 specifically provides that the provisions
21 of NRS 171.083 are controlling. As quoted on page 4 of Defendant's brief, even in 2001, NRS
22 171.095 provided, "**Except as otherwise provided in subsection 2 and NRS 171.083 ...**".
23 Each of the provisions of NRS 171.095 is subject to the qualifications of NRS 171.083. This
24 Court need not go any further in its analysis of this issue. The legislative intent is made clear
25 by the plain language of NRS 171.095, even as it appeared in 2001.

26 It is no coincidence that the case cited by Defendant in support of his argument was
27 decided prior to 1997. See *Houtz v. State*, 111 Nev. 457 (1995), cited by Defendant on Page 5
28 of his Motion for the following proposition: "The Nevada Legislature has never included child
sexual abuse among those offenses which have no statute of limitations for prosecution." This
is because NRS 171.083 became effective on October 1, 1997. Defendant took a dicta
statement from a 1995 case and incorrectly represented it to this Court as the current state of
the law. Defendant's claim lacks merit. There is no statute of limitations for the crimes in this
case; therefore, Defendant's Motion should be denied.

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CONCLUSION

Based upon the foregoing argument, the State respectfully requests that this Court deny Defendant's Motion to Dismiss Due to Statute of Limitations.

DATED this 29th day of November, 2018.

Respectfully submitted,

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

BY /s/ Jacob J. Villani
JACOB J. VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 29th day of November, 2018, by electronic transmission to:

TEGAN MACHNICH, Deputy Public Defender
Email Address: tegan.machnich@clarkcountynv.gov

ANN McMAHAN, Legal Secretary
Email Address: mcmahaac@clarkcountynv.gov

BY: /s/ J. Georges
Secretary for the District Attorney's Office

JV/jg/SVU

ORIGINAL

Electronically Filed
12/3/2018 10:28 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JACOB J. VILLANI
Chief Deputy District Attorney
Nevada Bar #11732
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL MCDONALD,
#1753770

Defendant.

CASE NO: C-18-334954-1

DEPT NO: X

RECEIPT OF COPY FOR DISCOVERY PROVIDED

RECEIPT OF COPY of the foregoing DISCOVERY:

1. One DVD labeled "McDonald Disc 1" containing files with the following names (sizes):

- EV - Archived Events - LLV011228000052 - - 6358 - BRYANT - BETTY - 12-28-2001 (1,600KB)
- EV - CODIS Entry Report - LLV011228000052 - - 6358 - BRYANT - BETTY - 8-1-2017 (283KB)
- EV - Declaration of Warrant-Summons - LLV011228000052 - - 6224 - MCDONALD - SAMUEL - 4-18-2018 (127KB)
- EV - Forensic Lab Report-Analysis - LLV011228000052 - 0 - 6358 - BRYANT - BETTY - 8-14-2017 - (63KB)
- EV - Forensic Lab Report-Analysis - LLV011228000052 - 0 - 6358 - COTTON - BETTY - 4-5-2018 - (115KB)

- EV - Forensic Outsourcing Report - LLV011228000052 - - 6358 - BRYANT - BETTY - 8-1-2017 (643KB)
- EV - Hit Disposition - LLV011228000052 - 1753770 - 6358 - BRYANT - BETTY - 9-26-2017 - CODIS (524KB)
- EV - Property Release-Temporary Release - LLV011228000052 - - 6358 - BRYANT - BETTY - 2-20-2016 (15KB)
- EV - Property Report - LLV011228000052 - - 6358 - BRYANT - BETTY - 1-18-2018 (38KB)
- EV - Property Report - LLV011228000052 - 1753770 - 6224 - COTTON - BETTY - 1-30-2018 (36KB)
- EV - Property Withdrawal-Return - LLV031125001495 - - 7923 - HERNANDEZ - CARLOS - 11-15-2017 (890KB)
- EV - Property Withdrawal-Return - LLV031125001495 - - 7923 - HERNANDEZ - DAWN - 3-16-2016 (93KB)
- EV - Request for Prosecution-No Prosecution - LLV011228000052 - 1753770 - 6224 - COTTON - BETTY - 12-28-2001 (22KB)
- EV - Voluntary Statement - LLV011228000052 - - 6358 - COTTON - BETTY - 1-18-2018 (529KB)
- EV - Voluntary Statement - LLV011228000052 - - 6358 - COTTON - BETTY - 11-28-2017 (434KB)
- PILRMSCaseReport (114KB)

is hereby acknowledged this 30 day of ^{November}~~December~~, 2018.

PUBLIC DEFENDER
ATTORNEY FOR DEFENDANT

BY Spencer Brown

jv/SVU



1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0556
3 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
4 NEVADA BAR NO. 11642
5 **PUBLIC DEFENDERS OFFICE**
6 309 South Third Street, Suite 226
7 Las Vegas, Nevada 89155
8 Telephone: (702) 455-4685
9 Facsimile: (702) 455-5112
10 Tegan.Machnich@clarkcountynv.gov
11 *Attorneys for Defendant*

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 THE STATE OF NEVADA,)	
)	
15 Plaintiff,	)	CASE NO. C-18-334954-1
)	
16 v.	)	DEPT. NO. X
)	
17 SAMUEL MCDONALD,)	
)	
18 Defendant,)	
19)	

20 **NOTICE OF WITHDRAWAL OF MOTION**

21 TO: CLARK COUNTY DISTRICT ATTORNEY'S OFFICE AND DISTRICT COURT
22 DEPARTMENT X:

23 You, and each of you, will please take notice that Defendant, SAMUEL MCDONALD,
24 by and through his attorney, TEGAN MACHNICH, Chief Deputy Public Defender, hereby
25 withdraws his Motion to Dismiss Due to Statute of Limitations. Following a review of
26 applicable law and legislative history, Defendant cannot proceed in good faith on the motion.

27 Further, Defendant hereby requests that the hearing, currently set for December 10, 2018,
28 be vacated.

DATED this 3rd day of December, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing NOTICE was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountydade.com on this 3rd day of December, 2018.

By: /s/ Erin Prisbrey
An employee of the
Clark County Public Defender's Office



1 **NOTM**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 JACOB VILLANI
6 Chief Deputy District Attorney
7 Nevada Bar #011732
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

13 SAMUEL MCDONALD,
14 #1753770
15 Defendant.

CASE NO: C-18-334954-1

DEPT NO: X

16 **STATE'S RENEWED NOTICE OF MOTION AND MOTION IN LIMINE TO**
17 **ADMIT EVIDENCE OF SEPARATE SEXUAL OFFENSES FOR PROPENSITY**
18 **PURPOSES**

18 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the State of
19 Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JACOB
20 VILLANI, Chief Deputy District Attorney, will bring a **Motion in Limine to Admit Evidence**
21 **of Separate Sexual Offenses for Propensity Purposes** before the above entitled Court on the
22 **14th** day of JANUARY, 2019, at the hour of 8:30 o'clock A.M., or as soon thereafter as
23 counsel may be heard.

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

27 ///

28 ///

1 POINTS AND AUTHORITIES

2 PROCEDURAL HISTORY

3 On October 20, 2005, the State of Nevada ("State") filed an Amended Criminal
4 Complaint in Case 05FN1441X charging Defendant Samuel McDonald ("Defendant") with:
5 Counts 1 & 2 – Sexual Assault with a Minor Under Fourteen Years of Age (Victim D.W.);
6 Counts 3, 4, 5 & 6 – Sexual Assault with a Minor Under Fourteen Years of Age (Victim A.S.);
7 Counts 7 & 8 – Sexual Assault with a Minor Under Fourteen Years of Age (Victim K.S.);
8 Count 9 – Lewdness with a Child Under the Age of 14 (Victim K.S.); and Count 10 –
9 Lewdness with a Child Under the Age of 14 (Victim D.W.). Also in the Amended Criminal
10 Complaint it is noted that Defendant was previously "convicted of Lewdness/Lascivious acts
11 with a Child in the State of California in 1989." Exhibit 1.

12 On December 15, 2005, Defendant entered into a Guilty Plea Agreement ("GPA") with
13 the State in case 05C217360 wherein he pleaded guilty to Count 1 – Lewdness with a Child
14 Under the Age of 14 (Naming Victims D.W., A.S., and K.S.); and Count 2 – Attempt Sexual
15 Assault with a Minor Under Sixteen Years of Age (Naming Victims D.W., A.S., and K.S.).
16 Exhibit 2.

17 On January 31, 2006, Defendant was sentenced to serve Life in prison with the
18 possibility of parole after 10 years on Count 1, and 2 to 10 years on Count 2. Count 2 was
19 ordered to run consecutive to Count 1. Exhibit 3.

20 On September 19, 2018, the State of Nevada ("State") filed an Indictment charging
21 Defendant with Counts 1 and 2 – Sexual Assault with a Minor Under Fourteen Years of Age
22 (Victim S.B.).

23 On October 10, 2018, Defendant was arraigned, pleaded not guilty, invoked the 60-day
24 rule, and his trial was set to begin on December 10, 2018.

25 On October 29, 2018, Defendant filed a Petition for Writ of Habeas Corpus, which this
26 Court denied via minute order on November 16, 2018.

27 On November 1, 2018, the State filed a Motion in Limine to Admit Evidence of Other
28 Crimes, Wrongs or Acts that Constitute Separate Sexual Offenses, which this Court also

1 denied in the November 16, 2018 minute order, stating:

2 The COURT FURTHER ORDERS, State's Motion in Limine to Admit
3 Evidence of Other Crimes, Wrongs or Acts that Constitute Separate Sexual
4 Offenses is DENIED. While NRS 48.045(3) does not prevent the admission of
5 other sexual offenses, the statute does not require the admission of said offenses.
Here, the probative value of admission of the other sexual acts is outweighed by
the prejudicial nature of the admission of the other sexual acts.

6 On January 3, 2019, the Nevada Supreme Court issued its opinion in Franks v. State,
7 attached as Exhibit 5. This renewed motion follows.

8 **STATEMENT OF FACTS PERTINENT TO THIS MOTION**

9 On August 18, 2005, Officer Watson with the North Las Vegas Police Department
10 responded to Sunrise Hospital Pediatric Emergency Room reference a sexual assault on two
11 minors. Exhibit 4. Officer Watson contacted the mother of the minors, Tuwanna Smith, who
12 told him that on August 16, 2005, her 11-year-old daughter, D.W., came to her and asked if
13 she still liked "Sam," referring to Defendant. Tuwanna told D.W. "yes," and D.W. told
14 Tuwanna that Defendant was nasty and that she needed to talk to A.S. and K.S., her little
15 brother and sister. Tuwanna asked A.S. and K.S. if they needed to tell her anything. K.S. told
16 A.S. to go first. A.S. told Tuwanna that Defendant put his "wee wee" in his butt. K.S. told
17 Tuwanna that Defendant did the same thing to her. Tuwanna asked the children when this
18 happened, and the children replied that it happened "last Tuesday," which would have been
19 August 9, 2005.

20 Tuwanna contacted Sunrise Hospital and was given an appointment for a SCAN exam
21 for the children. Tuwanna told Officer Watson there were four small children living in the
22 house: D.W. (age 11); E.B. (age 4); A.S. (age 9); and K.S. (age 6). Officer Watson requested
23 that all of the children be examined and forensic interviews be conducted. Dr. N. Metha
24 interviewed all four children.

25 D.W. told Dr. Metha Defendant put his finger in her butt one night while driving to the
26 store. She said Defendant pulled over to the side of the road and pulled her pants down and
27 stuck his hand into her panties. Defendant told her she would get a whipping if she told
28 anybody.

1 A.S. told Dr. Metha that Defendant “does gay things” to him. When asked to explain,
2 A.S. told her Defendant puts his thing in A.S.’s butt and it hurts. A.S. said Defendant uses
3 “grease” when he did this.

4 K.S. told Dr. Metha that Defendant touches her front and back privates. She said
5 Defendant used grease on her butt and it felt nasty.

6 E.B. made no disclosures to Dr. Metha.

7 Defendant was arrested based upon the above disclosures and eventually pleaded guilty
8 and was sentenced on January 31, 2006 as indicated, *supra*, in the Procedural History section.

9 On December 28, 2001, S.B. was nine years old and staying with Defendant at a place
10 near University Medical Center. On that date, Defendant orally and anally penetrated S.B.
11 with his penis. The rape lasted about 15 to 20 minutes, and S.B. told his mother about it when
12 she got home. S.B.’s mother took him to UMC where a nurse took a Sexual Assault Kit
13 (“SAK”) including intimate swabs. S.B.’s SCAN examination indicated that he had “multiple
14 superficial lacerations just deep enough to ooze a small amount of blood extending radially
15 from the rectum. This is consistent with rectal penetration.” S.B. believed that his mother was
16 following up with his case.

17 In March of 2017, as a result of funding received pursuant to the Sexual Assault Kit
18 Initiative (“SAKI”) grant to test all untested rape kits, S.B.’s SAK (which had gone untested)
19 was tested by Bode Cellmark Forensics. An unknown male DNA profile was developed from
20 the sperm fraction of S.B.’s rectal swabs and uploaded into the Combined DNA Index System
21 (“CODIS”).

22 On August 14, 2017, LVMPD received a CODIS hit returning to Defendant. On January
23 18, 2018, LVMPD detectives executed a search warrant and obtained a buccal swab from
24 Defendant. The buccal swab obtained was compared to the unknown DNA profile developed
25 by Bode Cellmark Forensics. LVMPD’s forensic lab determined that the DNA profile from
26 Defendant’s buccal matched the DNA profile from S.B.’s SAK rectal swabs. The possibility of
27 randomly selecting an unrelated individual from the general population having a DNA profile
28 that is consistent with the deduced DNA profile obtained is approximately 1 in 16.4 trillion.

1 **LEGAL ARGUMENT**

2 **PURSUANT TO NRS 48.045(3), EVIDENCE OF DEFENDANT'S OTHER SEXUAL**
3 **OFFENSES IS ADMISSIBLE TO SHOW DEFENDANT'S PROPENSITY TO**
4 **COMMIT SEXUAL OFFENSES**

5 NRS 48.045(3), as amended and effective as of October 1, 2015, provides:

6 3. Nothing in this section shall be construed to prohibit the
7 admission of evidence in a criminal prosecution for a sexual
8 offense that a person committed another crime, wrong or act that
9 constitutes a separate sexual offense. As used in this subsection,
10 "sexual offense" has the meaning ascribed to it in NRS
11 179D.097."

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

13 1. "Sexual offense" means any of the following offenses:

14 . . .

15 (b) Sexual assault pursuant to NRS 200.366.

16 . . .

17 (d) Battery with intent to commit sexual assault pursuant to
18 subsection 4 of NRS 200.400.

19 . . .

20 (g) Abuse of a child pursuant to NRS 200.508, if the abuse
21 involved sexual abuse or sexual exploitation.

22 . . .

23 (j) Open or gross lewdness pursuant to NRS 201.210.

24 . . .

25 (l) Lewdness with a child pursuant to NRS 201.230.

26 . . .

27 (r) Any other offense that has an element involving a sexual act
28 or sexual conduct with another.

(s) An attempt or conspiracy to commit an offense listed in
paragraphs (a) to (r), inclusive . . ."

23 On January 3, 2019, the Nevada Supreme Court issued its opinion in Franks v. State
24 (attached). The Court held:

25 We conclude that the plain language of NRS 48.045(3) permits the district court
26 to admit evidence of a separate sexual offense for purposes of proving
propensity in a sexual offense prosecution.

27 The Court noted that no Petrocelli hearing is necessary, as sexual offenses are excluded from
28 the requirements of NRS 48.045(1) and (2). The Court then set forth a three-part analysis for

1 district court's to adhere to when determining whether evidence is admissible under NRS
2 48.045(3):

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

9 **1. Relevant to the crime charged.**

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

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

19 In the instant case, the three children Defendant pleaded guilty to sexually molesting
20 were all between the ages of 6 and 11, and included both boys and girls. Defendant committed
21 these crimes *after* committing the crimes with which he is currently charged (relating to
22 sexually molesting a 9-year-old boy), and these offenses all fall within the definition of "sexual
23 offense" under NRS 179D.097.

24 In most sexual offense cases (especially those dealing with children), the State's most
25 difficult hurdle is convincing a jury that a defendant is the "type" of person who would commit
26 such a horrific act. Only after the jury is convinced of this, do they even begin to consider
27 whether the State has proven the elements of the offense beyond a reasonable doubt. If a jury
28 doesn't believe a defendant is capable of an act, the State doesn't stand a chance of obtaining
a guilty verdict. Here, Defendant's subsequent crimes are extremely relevant because they
show he is a child predator and certainly capable of the acts he is alleged to have committed
in the instant case, thus making it more probable that he engaged in the charged conduct.

///

///

1 **2. Proven by a preponderance of the evidence.**

2 Regarding the burden the State must meet in order to admit the evidence, the Court
3 stated:

4 ... prior to the admission of prior sexual offense evidence for propensity
5 purposes under NRS 48.045(3), the district court must make a preliminary
6 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.

7 The Court found that the victim's testimony alone in Franks was sufficient to meet this burden,
8 citing Keeney v. State, 109 Nev. 220, 229 (1993) (holding that even a higher burden, clear and
9 convincing evidence, can be provided by a victim's testimony alone).

10 Here, not only are the victims able to testify regarding Defendant's prior crimes,
11 Defendant himself pleaded guilty to committing the crimes. This far surpasses the
12 preponderance of the evidence standard required by our Supreme Court.

13 **3. Weighed to determine that its probative value is not substantially outweighed**
14 **by the danger of unfair prejudice.**

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

23 **The Similarity of the Prior Acts Charged**

24 In Franks, the court noted that the prior acts and the act for which Franks was charged
25 were identical, thus weighing in favor of the probative value of the evidence. Likewise, in this
26 case Defendant's acts are identical, even down to the ages of the children. Thus, the probative
27 value of the evidence is extremely high.

28 ///

1 **The Closeness in Time of the Prior Acts to the Acts Charged**

2 In Franks, the victim could not testify as to the exact dates when the prior sexual offense
3 acts occurred. The Court did not take issue with this fact, citing LeMay (reasoning that the
4 lapse of *12 years* between trial and the prior sexual offenses did not render admission of
5 relevant evidence of the similar prior acts an abuse of discretion). Here, approximately three
6 and a half years separated Defendant's crimes against S.B. and the crimes he subsequently
7 committed against three other children. If anything, the short lapse in time and increase in
8 number of victims shows that Defendant was emboldened by the fact he was not brought to
9 justice for molesting S.B., thus weighing in favor of the probative value of the evidence.

10 **The Frequency of the Prior Acts**

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

13 The "frequency of events" factor discussed in Glanzer also cuts in favor of the
14 government. Although it was not introduced at trial, the government also had
15 evidence of a third incident in which LeMay had sexually abused his young
16 relatives. True, this incident occurred even before the 1989 abuse of his cousins
17 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.

18 LeMay at 1029. Here, the "frequency of events" factor appears to weigh in favor of the
19 probative value of the evidence, as not only did the "events" continue past the instant victim,
20 they also preceded this case with Defendant's first sexual offense coincidentally also occurring
21 in 1989.

22 **The Presence or Lack of Intervening Circumstances**

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

26 ///

27 ///

28 ///

1 **The Necessity of the Evidence beyond the Testimonies Already Offered at Trial**

2 In Franks, the Court addressed this factor as follows:

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

7 This analysis also applies to the instant case. While the evidence of Defendant's subsequent
8 conduct may or may not be absolutely necessary, it is certainly helpful to the State's case.
9 Additionally, it is "practically necessary" in the sense that the State must prove to 12 people
10 beyond a reasonable doubt that Defendant is capable of the acts alleged. The probative value
11 of the fact Defendant pleaded guilty to the same conduct with separate victims a few years
12 later is enormous, and cannot be said to be *substantially* outweighed by the risk of unfair
13 prejudice.

14 The probative weight of the breadth and scope of Defendant's sexual abuse of children
15 is enormous in this case. For crimes like these, pursuant to NRS 48.045(3), a jury is entitled
16 to know that his behavior in this case involving S.B. is not an isolated event, but actions that
17 have repeatedly occurred with others over the years. Our Supreme Court has now made it clear
18 that NRS 48.045(3) clearly indicates the legislature's intent to allow admission of the type of
19 evidence the State seeks to admit in this case *for propensity purposes*. When this Court made
20 its previous ruling on this issue, it was without the benefit or guidance of the recent Supreme
21 Court opinion in Franks. Additionally, in its Order this Court found "that the probative value
22 of admission of the other sexual acts is outweighed by the prejudicial nature of the admission
23 of the other sexual acts." However, the standard is not merely that the prejudice outweigh the
24 probative value, the prejudice has to *substantially* outweigh the probative value of the
25 evidence.

26 Here, where evidence will be presented that Defendant's DNA was located inside the
27 anus of a 9-year-old boy, it cannot be said that the prejudice he will face from the jury knowing
28 that he has committed similar crimes will be very high. As the 9th Circuit stated in United
 States v. Mahler, "evidence relevant to a defendant's motive is not rendered inadmissible

1 because it is of a highly prejudicial nature. . . . The best evidence often is.” 452 F.2d 547 (9th
2 Cir. 1971), cert. denied, 405 U.S. 1069, 92 S. Ct. 1517, 31 L. Ed. 2d 801 (1972). Thus,
3 evidence of Defendant’s subsequent sexual offenses should be admitted in this case for
4 propensity purposes.

5 **CONCLUSION**

6 The State begs this Court to consider this issue in light of the Supreme Court’s recent
7 opinion in Franks and allow the admission of evidence that Defendant has previously pleaded
8 guilty to molesting children. In the alternative, the State respectfully requests that this Court
9 set forth the analysis required under LeMay in its Order as to why the prejudice of this
10 evidence substantially outweighs any probative value.

11 DATED this 3rd day of January, 2019.

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

14
15 BY /s/ Jacob Villani
16 JACOB VILLANI
17 Chief Deputy District Attorney
Nevada Bar #011732

18
19
20 **CERTIFICATE OF ELECTRONIC TRANSMISSION**

21 I hereby certify that service of the above and foregoing was made this 3rd day of
22 January, 2019, by electronic transmission to:

23 TEGAN MACHNICH, Deputy Public Defender
24 E-mail Address: tegan.machnich@clarkcountynv.gov

25 ANN McMAHAN, Legal Secretary
26 E-mail Address: mcmahaae@clarkcountynv.gov

27 BY: /s/ J. Georges
Secretary for the District Attorney's Office

28 jg/SVU

JUSTICE COURT, NORTH LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED IN OPEN COURT
OCT 20 2005
CLERK DATE

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL CRAIG MCDONALD,
#1753770,

Defendant.

CASE NO: 05FN1441X

DEPT NO: 1

AMENDED

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Felony - NRS 200.364, 200.366); and LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Felony - NRS 201.230), in the manner following, to-wit: That the said Defendant, on or between March 1, 2004, and August 9, 2005, at and within the County of Clark, State of Nevada,

COUNT 1 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, on or between March 1, 2004, and March 1, 2005, then and there wilfully, unlawfully, and feloniously sexually assault and subject DOMINISHA WARD, a female child under fourteen years of age, to sexual penetration, to-wit: digital penetration, by inserting his finger into the anal opening of the said DOMINISHA WARD, against her will, or under conditions in which Defendant knew, or should have known, that the said DOMINISHA WARD was mentally or physically incapable of resisting or understanding the nature of Defendant's conduct, said Defendant having previously been convicted of Lewdness/Lascivious acts with a Child in the State of California in 1989.

COUNT 2 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE

did, on or between March 1, 2004, and March 1, 2005, then and there wilfully, unlawfully, and feloniously sexually assault and subject DOMINISHA WARD, a female child under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing

Exhibit 1

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1 his penis into the anal opening of the said DOMINISHA WARD, against her will, or under
2 conditions in which Defendant knew, or should have known, that the said DOMINISHA
3 WARD was mentally or physically incapable of resisting or understanding the nature of
4 Defendant's conduct said Defendant having previously been convicted of
5 Lewdness/Lascivious acts with a Child in the State of California in 1989.

6 COUNT 3 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
7 AGE

8 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
9 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
10 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
11 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
12 in which Defendant knew, or should have known, that the said AMARI SMITH was
13 mentally or physically incapable of resisting or understanding the nature of Defendant's
14 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
15 a Child in the State of California in 1989.

16 COUNT 4 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
17 AGE

18 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
19 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
20 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
21 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
22 in which Defendant knew, or should have known, that the said AMARI SMITH was
23 mentally or physically incapable of resisting or understanding the nature of Defendant's
24 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
25 a Child in the State of California in 1989.

26 COUNT 5 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
27 AGE

28 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,

1 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
2 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
3 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
4 in which Defendant knew, or should have known, that the said AMARI SMITH was
5 mentally or physically incapable of resisting or understanding the nature of Defendant's
6 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
7 a Child in the State of California in 1989.

8 COUNT 6 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
9 AGE

10 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
11 unlawfully, and feloniously sexually assault and subject AMARI SMITH, a female child
12 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
13 penis into the anal opening of the said AMARI SMITH, against her will, or under conditions
14 in which Defendant knew, or should have known, that the said AMARI SMITH was
15 mentally or physically incapable of resisting or understanding the nature of Defendant's
16 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
17 a Child in the State of California in 1989.

18 COUNT 7 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
19 AGE

20 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
21 unlawfully, and feloniously sexually assault and subject KIARRA SMITH, a female child
22 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
23 penis into the anal opening of the said KIARRA SMITH, against her will, or under
24 conditions in which Defendant knew, or should have known, that the said KIARRA SMITH
25 was mentally or physically incapable of resisting or understanding the nature of Defendant's
26 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
27 a Child in the State of California in 1989.

28 //

1 COUNT 8 - SEXUAL ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF
2 AGE

3 did, on or between August 9, 2004, and August 9, 2005, then and there wilfully,
4 unlawfully, and feloniously sexually assault and subject KIARRA SMITH, a female child
5 under fourteen years of age, to sexual penetration, to-wit: anal intercourse, by placing his
6 penis into the anal opening of the said KIARRA SMITH, against her will, or under
7 conditions in which Defendant knew, or should have known, that the said KIARRA SMITH
8 was mentally or physically incapable of resisting or understanding the nature of Defendant's
9 conduct said Defendant having previously been convicted of Lewdness/Lascivious acts with
10 a Child in the State of California in 1989.

11 COUNT 9 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

12 did, on or between March 1, 2004, and March 1, 2005, then and there wilfully,
13 lewdly, unlawfully, and feloniously commit a lewd or lascivious act with the body of
14 KIARRA SMITH, a child under the age of fourteen years, by fondling the genitals and/or
15 buttocks of the said KIARRA SMITH with his hand, with the intent of arousing, appealing
16 to, or gratifying the lust, passions, or sexual desires of said Defendant, or said child said
17 Defendant having previously been convicted of Lewdness/Lascivious acts with a Child in the
18 State of California in 1989.

19 COUNT 10 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

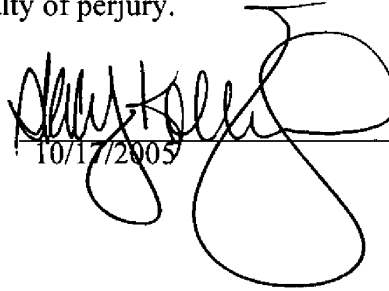
20 did, on or between March 1, 2004, and March 1, 2005, then and there wilfully,
21 lewdly, unlawfully, and feloniously commit a lewd or lascivious act with the body of
22 DOMINISHA WARD, a child under the age of fourteen years, by fondling the genitals
23 and/or buttocks of the said DOMINISHA WARD with his hand, with the intent of arousing,
24 appealing to, or gratifying the lust, passions, or sexual desires of said Defendant, or said
25 child said Defendant having previously been convicted of Lewdness/Lascivious acts with a
26 Child in the State of California in 1989.

27 All of which is contrary to the form, force and effect of Statutes in such cases made

28 //

1 and provided and against the peace and dignity of the State of Nevada. Said Complainant
2 makes this declaration subject to the penalty of perjury.

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10/17/2005

05FN1441X/ct/SVU
NLVPD EV# 05-20339
SEX ASSLT; VICT U/14;
LEWD W/MINOR - PRIOR - F
(TK3)

ORIGINAL

1 **GMEM**

2 **DAVID ROGER**
3 **Clark County District Attorney**
4 **Nevada Bar #002781**
5 **STACY L. KOLLINS**
6 **Deputy District Attorney**
7 **Nevada Bar #005391**
8 **200 Lewis Avenue**
9 **Las Vegas, NV 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

FILED IN OPEN COURT
DEC 15 2005
SHIRLEY B. PARRAGUIRRE, CLERK
BY *[Signature]*
PHYLLIS IRBY DEPUTY

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **-vs-**

12 **SAMUEL CRAIG MCDONALD,**
13 **#1753770**

14 **Defendant.**

CASE NO: C217360
DEPT NO: XX

15 **GUILTY PLEA AGREEMENT**

16 I hereby agree to plead guilty, pursuant to North Carolina v. Alford, 400 U.S. 25
17 (1970), to: **COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14**
18 **(Category A, Felony - NRS 201.230); and COUNT 2 - ATTEMPT SEXUAL ASSAULT**
19 **WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category B, Felony - NRS**
20 **193.330, 200.364, 200.366), as more fully alleged in the charging document attached hereto**
21 **as Exhibit "1".**

22 My decision to plead guilty by way of the Alford decision is based upon the plea
23 agreement in this case which is as follows:

24 The State and the Defendant agree to stipulate to prison terms in the Nevada
25 Department of Corrections for ten (10) years to Life on Count 1 - Lewdness with a Child
26 Under the Age of 14 and two (2) to fifteen (15) years on Count 2 - Attempt Sexual Assault
27 with a Minor Under Sixteen Years of Age. The State will make no recommendation as to
28 concurrent or consecutive sentences.

Exhibit 2

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DEC 15 2005
CLERK

1 The Defendant agrees that if he fails to appear for any court appearances or Parole &
2 Probation appearances, the sentences for each offense will run consecutive. Further, the
3 State agrees the Defendant may stay out of custody on ISU until rendition of sentence. The
4 Defendant understands he is not eligible for probation. Additionally, the State may argue the
5 facts and circumstances of the offense at the time of sentencing.

6 CONSEQUENCES OF THE PLEA

7 By pleading guilty pursuant to the Alford decision, it is my desire to avoid the
8 possibility of being convicted of more offenses or of a greater offense if I were to proceed to
9 trial on the original charge(s) and of also receiving a greater penalty. I understand that my
10 decision to plead guilty by way of the Alford decision does not require me to admit guilt, but
11 is based upon my belief that the State would present sufficient evidence at trial that a jury
12 would return a verdict of guilty of a greater offense or of more offenses than that to which I
13 am pleading guilty to.

14 I understand that as a consequence of my plea of guilty by way of the Alford decision
15 to **Count 1**, the Court must sentence me to imprisonment in the Nevada State Prison for
16 LIFE with the possibility of parole with parole eligibility after a minimum of ten (10) years.
17 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum
18 term of imprisonment. I understand that the law requires me to pay an Administrative
19 Assessment Fee.

20 I understand that as a consequence of my plea of guilty by way of the Alford decision
21 to **Count 2**, the Court must sentence me to imprisonment in the Nevada Department of
22 Corrections for a minimum term of not less than two (2) years and a maximum term of not
23 more than twenty (20) years. The minimum term of imprisonment may not exceed forty
24 percent (40%) of the maximum term of imprisonment.

25 I understand that, if appropriate, I will be ordered to make restitution to the victim of
26 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
27 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
28 reimburse the State of Nevada for any expenses related to my extradition, if any.

1 I understand that, if appropriate, I will be ordered to make restitution to the victim of
2 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
3 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
4 reimburse the State of Nevada for any expenses related to my extradition, if any.

5 Further, that before I am eligible for parole a panel consisting of the administrator of
6 the mental health and developmental services of the department of human resources or his
7 designee; the director of the department of corrections or his designee; and a psychologist
8 license to practice in this state or a psychiatrist license to practice medicine in this state
9 certifies that I was under observation while confined in an institution of the department of
10 corrections that I do not represent a high risk to reoffend based upon a currently accepted
11 standard of assessment.

12 I further understand that the Court will include as part of my sentence, in addition to
13 any other penalties provided by law, lifetime supervision commencing after any period of
14 probation or any term of imprisonment and period of release upon parole; said special
15 sentence of lifetime supervision must begin upon release from incarceration.

16 I further understand that the Court will include as part of my sentence, in addition to
17 any other penalties provided by law, pursuant to NRS 179D.450, I must register as a sex
18 offender within 48 hours of release from custody.

19 I also understand that I must submit to blood and/or saliva tests under the Direction of
20 the Division of Parole and Probation to determine genetic markers and/or secretor status.

21 I understand that if more than one sentence of imprisonment is imposed and I am
22 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
23 the sentences served concurrently or consecutively.

24 I understand that if more than one sentence of imprisonment is imposed and I am
25 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
26 the sentences served concurrently or consecutively.

27 I also understand that information regarding charges not filed, dismissed charges, or
28 charges to be dismissed pursuant to this agreement may be considered by the judge at

1 sentencing.

2 I have not been promised or guaranteed any particular sentence by anyone. I know
3 that my sentence is to be determined by the Court within the limits prescribed by statute.

4 I understand that if my attorney or the State of Nevada or both recommend any
5 specific punishment to the Court, the Court is not obligated to accept the recommendation.

6 I understand that if the State of Nevada has agreed to recommend or stipulate a
7 particular sentence or has agreed not to present argument regarding the sentence, or agreed
8 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor
9 when the offense could have been treated as a felony, such agreement is contingent upon my
10 appearance in court on the initial sentencing date (and any subsequent dates if the sentencing
11 is continued). I understand that if I fail to appear for the scheduled sentencing date or I
12 commit a new criminal offense prior to sentencing the State of Nevada would regain the full
13 right to argue for any lawful sentence.

14 I understand if the offense(s) to which I am pleading guilty to was committed while I
15 was incarcerated on another charge or while I was on probation or parole that I am not
16 eligible for credit for time served toward the instant offense(s).

17 I understand that as a consequence of my plea of guilty, if I am not a citizen of the
18 United States, I may, in addition to other consequences provided for by federal law, be
19 removed, deported, excluded from entry into the United States or denied naturalization.

20 I understand that the Division of Parole and Probation will prepare a report for the
21 sentencing judge prior to sentencing. This report will include matters relevant to the issue of
22 sentencing, including my criminal history. This report may contain hearsay information
23 regarding my background and criminal history. My attorney and I will each have the
24 opportunity to comment on the information contained in the report at the time of sentencing.
25 Unless the District Attorney has specifically agreed otherwise, then the District Attorney
26 may also comment on this report.

27 WAIVER OF RIGHTS

28 By entering my plea of guilty, I understand that I am waiving and forever giving up

1 the following rights and privileges:

2 1. The constitutional privilege against self-incrimination, including the right to refuse
3 to testify at trial, in which event the prosecution would not be allowed to comment to the
4 jury about my refusal to testify.

5 2. The constitutional right to a speedy and public trial by an impartial jury, free of
6 excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the
7 assistance of an attorney, either appointed or retained. At trial the State would bear the
8 burden of proving beyond a reasonable doubt each element of the offense charged.

9 3. The constitutional right to confront and cross-examine any witnesses who would
10 testify against me.

11 4. The constitutional right to subpoena witnesses to testify on my behalf.

12 5. The constitutional right to testify in my own defense.

13 6. The right to appeal the conviction, with the assistance of an attorney, either
14 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional
15 or other grounds that challenge the legality of the proceedings and except as otherwise
16 provided in subsection 3 of NRS 174.035.

17 VOLUNTARINESS OF PLEA

18 I have discussed the elements of all of the original charge(s) against me with my
19 attorney and I understand the nature of the charge(s) against me.

20 I understand that the State would have to prove each element of the charge(s) against
21 me at trial.

22 I have discussed with my attorney any possible defenses, defense strategies and
23 circumstances which might be in my favor.

24 All of the foregoing elements, consequences, rights, and waiver of rights have been
25 thoroughly explained to me by my attorney.

26 I believe that pleading guilty and accepting this plea bargain is in my best interest,
27 and that a trial would be contrary to my best interest.

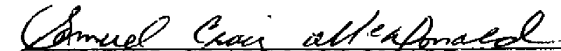
28 I am signing this agreement voluntarily, after consultation with my attorney, and I am

1 not acting under duress or coercion or by virtue of any promises of leniency, except for those
2 set forth in this agreement.

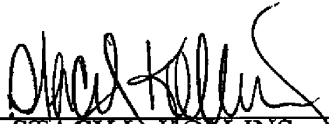
3 I am not now under the influence of any intoxicating liquor, a controlled substance or
4 other drug which would in any manner impair my ability to comprehend or understand this
5 agreement or the proceedings surrounding my entry of this plea.

6 My attorney has answered all my questions regarding this guilty plea agreement and
7 its consequences to my satisfaction and I am satisfied with the services provided by my
8 attorney.

9 DATED this 15th day of December, 2005.

10 
11 SAMUEL CRAIG MCDONALD
12 Defendant

13 AGREED TO BY:

14 
15 STACY L. ROLLINS
16 Deputy District Attorney
17 Nevada Bar #005391
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1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of
3 the court hereby certify that:

4 1. I have fully explained to the Defendant the allegations contained in the charge(s)
to which Alford pleas are being entered.

5 2. I have advised the Defendant of the penalties for each charge and the restitution
6 that the Defendant may be ordered to pay.

7 3. All pleas of Alford offered by the Defendant pursuant to this agreement are
consistent with the facts known to me and are made with my advice to the Defendant.

8 4. To the best of my knowledge and belief, the Defendant:

9 a. Is competent and understands the charges and the consequences of pleading
10 Alford as provided in this agreement.

11 b. Executed this agreement and will enter all Alford pleas pursuant hereto
voluntarily.

12 c. Was not under the influence of intoxicating liquor, a controlled substance or
13 other drug at the time I consulted with the Defendant as certified in paragraphs
1 and 2 above.

14 Dated: This 15th day of December, 2005.

15 
16 ATTORNEY FOR DEFENDANT
17
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ct/SVU

Shirley Stanagin
CLERK

1 **INFOSA**
2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
5 **STACY L. KOLLINS**
6 Deputy District Attorney
7 Nevada Bar #005391
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

12 I.A. 12/15/05
13 9:00 A.M.
14 PD A. YANEZ

DISTRICT COURT
CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA,

16 Plaintiff,

17 -vs-

18 SAMUEL CRAIG MCDONALD,
19 #1753770

20 Defendant.

Case No: C217360
Dept No: XX

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 DAVID ROGER, District Attorney within and for the County of Clark, State of
24 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That SAMUEL CRAIG MCDONALD, the Defendant(s) above named, having
26 committed the crimes of **LEWDNESS WITH A CHILD UNDER THE AGE OF 14**
27 (Category A, Felony - NRS 201.230); and **ATTEMPT SEXUAL ASSAULT WITH A**
28 **MINOR UNDER SIXTEEN YEARS OF AGE** (Category B, Felony - NRS 193.330,
200.364, 200.366), on or between March 1, 2004 and August 9, 2005, within the County of
Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made
and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14

did then and there wilfully, lewdly, unlawfully, and feloniously commit a lewd or
lascivious act with the body of DOMINISHA WARD and/or AMARI SMITH and/or

EXHIBIT "1"

1 KIARRA SMITH, a child under the age of fourteen years, by rubbing and/or touching the
2 anal opening of the said DOMINISHA WARD and/or AMARI SMITH and/or KIARRA
3 SMITH with his penis, with the intent of arousing, appealing to, or gratifying the lust,
4 passions, or sexual desires of said Defendant, or said child.

5 COUNT 2 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN
6 YEARS OF AGE

7 did then and there wilfully, unlawfully, and feloniously attempt to sexually assault
8 and subject DOMINISHA WARD and/or AMARI SMITH and/or KIARRA SMITH, female
9 children under sixteen years of age, to sexual penetration, to-wit: anal intercourse, by the
10 Defendant attempting to insert his penis into the anal opening of the said DOMINISHA
11 WARD and/or AMARI SMITH and/or KIARRA SMITH, against their will, or under
12 conditions in which Defendant knew, or should have known, that the said DOMINISHA
13 WARD and/or AMARI SMITH and/or KIARRA SMITH were mentally or physically
14 incapable of resisting or understanding the nature of Defendant's conduct.

15
16 DAVID ROGER
17 DISTRICT ATTORNEY
18 Nevada Bar #002781

19 BY /s/ Stacy L. Kollins
20 STACY L. KOLLINS
21 Deputy District Attorney
22 Nevada Bar #005391
23
24
25

26 DA#05FN1441X/ct/SVU
27 NLVPD EV#0520339
28 LEWD W/CHILD U/14;
ATT SEX ASSLT U/16 - F
(TK3)

ORIGINAL

JOCP

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

FEB 8 11 26 AM '06

Liberty E. Rungius
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL CRAIG MCDONALD,
#1753770

Defendant.

Case No: C217360

Dept No: XX

JUDGMENT OF CONVICTION
(PLEA OF GUILTY)

The Defendant previously appeared before the Court with counsel and entered a plea of guilty to the crime(s) of **COUNT 1 - LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A, Felony)**, in violation of NRS 201.230; and **COUNT 2 - ATTEMPT SEXUAL ASSAULT WITH A MINOR UNDER SIXTEEN YEARS OF AGE (Category B, Felony)**, in violation of NRS 193.330, 200.364, 200.366, pursuant to Alford plea; thereafter, on the 31st day of January, 2006, the Defendant was present in court for sentencing with his counsel, ABEL M. YANEZ, Deputy Public Defender, and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offense(s) and, in addition to the \$25.00 Administrative Assessment Fee, and the \$150.00 DNA Analysis fee including testing to determine genetic markers, the Defendant is sentenced as follows: to

COUNT 1 - LIFE in the Nevada Department of Corrections (NDC) with the possibility of parole beginning when a minimum of TEN (10) YEARS is served, and

Exhibit 3

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FEB 8 2006

CLERK

COUNTY CLERK

FEB - 2 2006

RECEIVED

1 **COUNT 2** - to a MAXIMUM of ONE HUNDRED & EIGHTY (180) MONTHS and
2 a MINIMUM of TWENTY-FOUR (24) MONTHS in NDC. Sentence in Count 2
3 CONSECUTIVE to sentence in Count 1, with TWO (2) DAYS credit for time served.

4 **COURT FURTHER ORDERED**, Lifetime Supervision to commence upon release
5 from any term of probation, parole, or imprisonment. Deft. shall register as a sex offender
6 within 48 hours of sentencing or release from custody. Deft. REMANDED to custody.

7 DATED this 6 day of February, 2006.

8 
9 _____
10 DISTRICT JUDGE

cf

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28 ct/SVU

CASE: 05020339
DATE: 8/20/05
TIME: 23:04

---NORTH LAS VEGAS POLICE DEPARTMENT--- REF: ORIGINAL
-----POLICE REPORT----- PAGE: 4
-----NARRATIVE PORTION----- OF: 4

ON 08-18-05 I RESPONDED TO SUNRISE HOSPITALPEDIATRIC EMERGENCY ROOM SCAN UNIT REFERENCE A SEXUAL ASSAULT TO TWO MINORS. I CONTACTED THE MOTHER OF THE CHILDREN, TUWANNA SMITH WHO TOLD ME THE FOLLOWING: ON 08-16-05 HER ELEVEN YEAR OLD DAUGHTER DOMINISHA WARD CAME TO HER AND ASKED IF SHE STILL LIKED SAM (SAMUEL MCDONALD). TUWANNA TOLD HER YES. DOMINISHA TOLD SAM WAS NASTY AND TOLD HER MOTHER SHE NEEDED TO TALK TO AMARI AND KIARRA, HER LITTLE BROTHER AND SISTER. TUWANNA ASKED AMARI AND KIARRA IF THEY NEEDED TO TELL HER ANYTHING. KIARRA TOLD AMARI TO GO FIRST. AMARI TOLD HIS MOTHER THAT SAM PUT HIS WEE WEE IN HIS BUT. KIARRA TOLD HER MOTHER HE DID THE SAME THING TO ME. TUWANNA ASKED WHEN THIS HAPPENED AND THE CHILDREN TOLD HER, LAST TUESDAY WHEN SHE WAS NEXT DOOR, THIS WOULD HAVE BEEN 08-09-05.

TUWANNA CONTACTED SUNRISE HOSPITAL AND WAS GIVEN AN APPOINTMENT FOR A SCAN EXAMINE. TUWANNA TOLD ME THERE ARE FOUR SMALL CHILDREN LIVING IN THE HOUSE. DOMINISHA WARD AGE 11, ERNEST BENFORD AGE 4, AMARI SMITH AGE 9, AND KIARRA SMITH AGE 6.

I REQUESTED THAT ALL THE CHILDREN BE EXAMINED AND A FORENSIC INTERVIEW BE CONDUCTED BY PEDIATRIC DOCTOR N. METHA. DR. METHA INTERVIEWED ALL FOUR CHILDREN AND TOLD ME THE FOLLOWING: DOMINISHA WARD TOLD HER SAM HAD PUT HIS FINGER IN HER BUT ONE NIGHT WHILE DRIVING TO THE STORE. SHE SAID SAM PULLED OVER TO THE SIDE OF THE ROAD AND PULLED HER PANTS DOWN AND STUCK HIS HAND INTO HER PANTIES.

SAM TOLD HER SHE WOULD GET A WHIPPING IF SHE TOLD ANYONE. AMARI SMITH TOLD DR. METHA THAT SAM DOSE GAY THING TO HIM. WHEN ASKED TO EXPLAIN HE TOLD HER, SAM PUTS HIS THING IN HIS BUTT AND IT HURTS. HE ALSO TOLD DR. METHA THAT SAM USED GREASE WHEN HE DID THIS. KIARA TOLD DR. METHA THAT SAM TOUCHES HER FRONT AND BACK PRIVATES. SHE ALSO SAID SAM USED GREASE ON HER BUTT AND IT FELT NASTY. ERNEST MADE NO DISCLOSURES. DR. METHA'S FULL SCAN EXAMINATION REPORT IS WORTHCOMING FOR FULL DETAILS OF THE INTERVIEWS.

TUWANNA SMITH TOLD ME SHE REPORTED THE INCIDENT WHERE SAM ALLEDGELLY TOUCH DOMINISHA AND THE CHARGE WAS UNFOUNDED.

A SCOPE CHECK OF SAMUEL MCDONALD REVEALED HE IS A TWO TIME REGISTERED SEX OFFENDER.

ON 08-19-05 I CONTACTED SAMUEL MCDONALD AT 4700 ENERGIZER WAY (DESERT GLASS) BASED ON THE FORENSIC INTERVIEW DISCLOSURES MADE BY AMARI AND KIARRA SMITH I PLACED SAM MCDONALD UNDER ARREST FOR SEXUAL ASSAULT OF A MINOR UNDER 14, TWO COUNTS. SAM WAS TRANSPORTED TO THE NLVDC AND BOOKED. ATTACHMENTS: BOOKING SHEET.

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SCARFF/DENISE

ser no ! detective bureau processed
1259 !

ser no

supervisor approving
LAROTONDA/CHRISTOPHER

ser no ! officer reporting
0517 ! WATSON/JIMMY RAY

S

ser no
0995

Exhibit 4

135 Nev., Advance Opinion |
IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH FRANKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72988

FILED

JAN 03 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

Law Office of Lisa Rasmussen and Lisa A. Rasmussen and Jim Hoffman,
Las Vegas,
for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson,
District Attorney, and Jennifer M. Clemons and Jonathan VanBoskerck,
Chief Deputy District Attorneys, Clark County,
for Respondent.

BEFORE CHERRY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, CHERRY, J.:

In this appeal, we consider a district court's decision to allow the State to introduce evidence of prior, uncharged sexual acts committed

Exhibit 5

by appellant during appellant's current prosecution for a sexual offense for purposes of showing propensity under NRS 48.045(3). We conclude that the plain language of NRS 48.045(3) permits the district court to admit evidence of a separate sexual offense for purposes of proving propensity in a sexual offense prosecution. We further conclude that, although such evidence may be admitted for propensity purposes without the district court holding a *Petrocelli* hearing, evidence of separate acts that constitute sexual offenses still must be evaluated for relevance and its heightened risk of unfair prejudice before being admitted. 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). Because we find that the district court did not plainly err by permitting the State to introduce evidence of appellant Kenneth Franks' prior conduct for propensity purposes, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 18, 2015, Franks was charged by criminal complaint with one count of lewdness with a child under the age of 14 related to events occurring in June 2015. A.F., Franks' twelve-year-old niece, testified that Franks was wrestling and tickling her when he pulled down her pants and underwear and rubbed her genitals. While Franks initially denied the misconduct, he ultimately admitted to a detective that he had pulled down A.F.'s pants and possibly "grazed her" genitals.

At trial, the State elicited testimony from A.F., A.F.'s father, Franks' mother, and Franks' brother that A.F. was at Franks' house between May and June 2015. However, Franks' brother and mother stated that there was a limited time frame within which Franks could have committed the crime on June 23 and 24. In addition, during the State's questioning of A.F., she made four statements alluding to prior uncharged instances of inappropriate touching, testifying that (1) Franks had previously "touched [her] on top of [her] clothes" with his hand; (2) Franks touched her in this fashion more than once; (3) the charged event was "the last time" Franks touched her; and (4) Franks touched her five times total, though she was unsure of the exact dates. Franks did not object to the admission of A.F.'s testimony, nor did the district court hold a hearing regarding its admissibility. The jury found Franks guilty of the charged offense, and he was sentenced to 10 years to life.

DISCUSSION

The district court did not plainly err by permitting the State to introduce evidence of Franks' prior acts that constitute separate sexual offenses for purposes of showing propensity under NRS 48.045(3)

Standard of review

We review questions of statutory interpretation de novo, and "when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (internal quotation marks omitted). "We [typically] review a district court's decision to admit or exclude evidence for an abuse of discretion," but "failure to object precludes appellate review of the matter unless it rises to the level of plain error." *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (internal quotations omitted). Reversal for plain error is only warranted if the appellant demonstrates that the error

was prejudicial to his substantial rights. *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485-86 (2006).

Statutory interpretation of NRS 48.045(3)

Franks argues that the district court plainly erred by permitting the State to introduce evidence of Franks' prior uncharged sexual acts to demonstrate propensity in his sexual offense prosecution under NRS 48.045(3). We disagree.

Prior to 2015, NRS 48.045(2) barred admission of all "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that the person acted in conformity therewith." However, in a 2015 amendment to Nevada's evidence code, the Legislature added a new rule, codified at NRS 48.045(3), which supersedes NRS 48.045(2)'s restriction on evidence of similar bad conduct for purposes of showing propensity in sexual offense cases. The amendment applies to "court proceeding[s] that [are] commenced on or after October 1, 2015." 2015 Nev. Stat., ch. 399, § 27(4), at 2246. The complaint against Franks was filed on September 18, 2015, but his trial commenced on November 28, 2016. Therefore, NRS 48.045(3) properly applied to Frank's criminal prosecution for lewdness with a child under the age of 14 years. *See Proceeding & Criminal Proceeding*, *Black's Law Dictionary* (10th ed. 2014) (defining "proceeding," in part, as "[a]n act or step that is part of a larger action" or "[t]he business conducted by a court or other official body; a hearing," and "criminal proceeding" as "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial"); *see also Howland v. State*, 990 S.W.2d 274, 277 (Tex. Crim. App. 1999) (concluding that a criminal proceeding includes any step in a criminal

prosecution, not merely the beginning of the prosecution itself, for the purposes of applying a newly enacted statute).

Turning to the language of NRS 48.045(3), the statute plainly provides that “[n]othing 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.”¹ (Emphasis added.) Therefore, in criminal prosecutions for sexual offenses, NRS 48.045(3) allows for the admission of evidence of a prior bad act constituting a sexual offense “to prove the character of a person in order to show that the person acted in conformity therewith” that would otherwise be barred under NRS 48.045(2). Reading NRS 48.045(3) as restating that prior sexual offenses may be considered for other purposes under NRS 48.045(2) but not for propensity purposes would render NRS 48.045(3) meaningless, as NRS 48.045(3) provides a specific admissibility standard in criminal sexual offense cases, replacing the general criteria set forth in NRS 48.045(2) and superseding subsection 2’s restriction on propensity evidence in such cases. Therefore, 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.

¹A “sexual offense” includes “[a]ny . . . offense that has an element involving a sexual act or sexual conduct with another.” NRS 179D.097(1)(r).

Application of NRS 48.045(3)

Franks argues that the district court erred by failing to hold a *Petrocelli*² hearing prior to its admission. We disagree.

Before admitting evidence of a prior bad act pursuant to NRS 48.045(2), this court determined that the district court must hold a *Petrocelli* hearing outside of the presence of the jury to determine that “(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant’s propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.” *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). As discussed, however, NRS 48.045(3) unambiguously removed prior sexual acts from NRS 48.045(2)’s ban on propensity evidence. Therefore, the *Petrocelli* framework established for admitting evidence of a prior act for purposes other than propensity is not applicable in cases where the State seeks to present evidence of separate acts constituting sexual offenses for purposes of showing propensity in a current sexual offense prosecution.

Still, Franks’ argument reveals a significant concern: although evidence of prior sexual acts no longer require a *Petrocelli* hearing prior to admission, the Legislature failed to outline any procedural safeguards to mitigate against “the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.” *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (internal quotation marks omitted). Therefore, as in *Petrocelli*, 101

²See *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

Nev. at 51-52, 692 P.2d at 507-08, we now address and rectify the absence of procedural safeguards with regard to evidence potentially admissible under NRS 48.045(3).

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.

Second, we note that the relevancy of a prior sexual offense also "depends upon the fulfillment of a condition of fact, [wherein] the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition." NRS 47.070(1). In light of the nature of prior sexual act evidence, federal courts require "district court[s] [to] make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the other act occurred." *See, e.g., United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (internal quotation marks omitted); *see also United States v. Oldrock*, 867 F.3d 934, 939 (8th Cir. 2017); *United States v. Dillon*, 532 F.3d 379, 387 (5th Cir. 2008). Therefore, 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.

Finally, while all “relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice,” *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (internal quotation marks omitted), other courts have cautioned to “pay careful attention to both the significant probative value and the strong prejudicial qualities of that evidence” due to “the inherent strength of [prior sexual act] evidence,” *LeMay*, 260 F.3d at 1027 (internal quotation marks omitted). In order to address the highly probative yet prejudicial nature of this evidence, the Ninth Circuit Court of Appeals set forth a modified balancing analysis, stating that the district court must consider several nonexhaustive factors prior to allowing its admission:

(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.

Id. at 1028 (internal quotation marks omitted). We conclude that the factors articulated by the Ninth Circuit are useful and account for the legislative intent to permit propensity evidence in sexual offense prosecutions—the purpose of NRS 48.045(3)—while also taking into account the risk of unfair prejudice that accompanies this strong evidence. Therefore, after a defendant challenges the State’s intent to introduce prior sexual offense evidence for propensity purposes, the district court should evaluate whether that evidence is unfairly prejudicial under the *LeMay* factors prior to admitting such evidence.

Here, although the district court applied no similar safeguards before permitting the State to introduce evidence of Franks’ prior acts under

NRS 48.045(3), it is apparent that Franks was not unfairly prejudiced by the admission of the prior bad acts. Franks' prior conduct demonstrated that he had a propensity to engage in such conduct. Further, a jury could reasonably find by a preponderance of the evidence that the prior conduct occurred from A.F.'s testimony. *See Keeney v. State*, 109 Nev. 220, 229, 850 P.2d 311, 317 (1993) (holding that a higher burden, clear and convincing evidence, can be provided by a victim's testimony alone), *overruled on other grounds by Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000), *modified on other grounds by State v. Eighth Judicial Dist. Court (Romano)*, 120 Nev. 613, 623, 97 P.3d 594, 600 (2004).

Finally, the probative value of the evidence of Franks' prior conduct was not substantially outweighed by the danger of unfair prejudice under *LeMay*. First, Franks' prior acts and the act for which he was charged in the underlying case were identical, as each act involved sexual misconduct targeting the same child and involved inappropriate touching. Further, although A.F. could not testify as to the exact dates when the prior sexual offense acts occurred, they were sufficiently frequent and close in time that A.F., who was 12 years old when the last offense occurred and 13 years old at the time of trial, could testify as to the number and details of the uncharged offenses, *see LeMay*, 260 F.3d at 1029 (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), and the record does not demonstrate any intervening circumstances that would alter the balance of the acts' probative value and risk of prejudice. 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*.” *Id.* A.F.’s testimony was helpful to the State’s case by establishing Franks’ propensity to commit the charged crime. Therefore, we conclude that the district court did not plainly err by admitting the evidence of Franks’ prior sexual offenses.³

Sufficient evidence supporting Franks’ conviction

Franks argues that there was insufficient evidence presented by the State to support his conviction because there was no evidence that the touching (1) was intentional beyond A.F.’s inadmissible testimony that he previously touched her, and (2) occurred during June 2015 as alleged in the charging documents. We disagree.

“[T]he test for sufficiency upon appellate review is not whether this court is convinced of the defendant’s guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept.” *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). Therefore, “the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation marks omitted). “[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.” *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (internal quotation marks omitted). Moreover, a lewdness victim’s testimony need not be

³Franks also disputes the district court’s jury instruction that it may consider evidence of his prior sexual acts for propensity purposes. Because NRS 48.045(3) allows the State to introduce prior crimes, wrongs, or acts that constitute a separate sexual offense for propensity purposes in a sexual offense prosecution, we conclude that Franks’ argument lacks merit.

corroborated. *See Gaxiola v. State*, 121 Nev. 638, 649-50, 119 P.3d 1225, 1233 (2005).

The previous version of NRS 201.230(1) (2005) provided as follows:

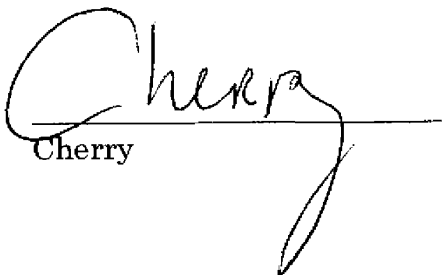
A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

Here, as to Franks' intent, and contrary to Franks' argument, evidence of repeated touching of A.F.'s genitals was admissible under NRS 48.045(3) to show propensity to commit the charged crime and was indicative of the fact that the charged act was not accidental. Moreover, A.F. testified that Franks pulled down her pants and underwear separately and his fingers "rubb[ed]" her genitals, which supports that the touching was intentional. Despite Franks' statement to police that he might have accidentally "grazed" A.F.'s genitals, a rational juror could find that the evidence established that Franks intentionally touched A.F. Second, as to the timing of the incident, a total of five witnesses—A.F., A.F.'s father, a detective, Franks' mother, and Franks' brother—provided testimony showing that A.F. was at Franks' house between May and June, 2015. Although Franks' brother and mother stated that there was a limited time frame within which Franks could have committed the crime on June 23 and 24, the jury maintained the right to either (1) disbelieve the testimony of Franks' family members as to those dates generally, or (2) find that there was nonetheless an opportunity for Franks to commit the crime


on those occasions. Therefore, we conclude that there was sufficient evidence to support Franks' conviction.

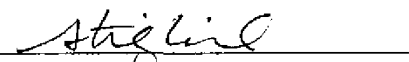
CONCLUSION

We conclude that the district court did not commit plain error by allowing the State to introduce evidence of Franks' prior sexual acts for propensity purposes. We further conclude that sufficient evidence supported Franks' conviction. Therefore, we affirm the judgment of conviction.

 J.
Cherry

We concur:

 J.
Parraguirre

 J.
Stiglich



1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0556
3 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
4 NEVADA BAR NO. 11642
5 **PUBLIC DEFENDERS OFFICE**
6 309 South Third Street, Suite 226
7 Las Vegas, Nevada 89155
8 Telephone: (702) 455-4685
9 Facsimile: (702) 455-5112
10 Tegan.Machnich@clarkcountynv.gov
11 *Attorneys for Defendant*

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)	
)	
10 Plaintiff,	)	CASE NO. C-18-334954-1
)	
11 v.	)	DEPT. NO. X
)	
12 SAMUEL MCDONALD,)	
)	
13 Defendant,	)	DATE: January 14, 2019
	)	TIME: 8:30 a.m.
14)	

15 **OPPOSITION TO STATE'S RENEWED MOTION IN LIMINE**

16 COMES NOW, the Defendant, SAMUEL MCDONALD, by and through TEGAN C.
17 MACHNICH, Deputy Public Defender and hereby requests that this Honorable Court deny the
18 State's renewed motion based upon the prior ruling in this case.

19 This Motion is made and based upon all the papers and pleadings on file herein, the
20 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

21 DATED this 8th day of January, 2019.

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24 By: /s/Tegan C. Machnich
25 TEGAN C. MACHNICH, #11642
26 Deputy Public Defender
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District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountydade.com

4



1 **NWEW**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **JACOB J. VILLANI**
6 **Chief Deputy District Attorney**
7 **Nevada Bar #011732**
8 **200 Lewis Avenue**
9 **Las Vegas, Nevada 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 **THE STATE OF NEVADA,**

11 **Plaintiff,**

12 **-vs-**

13 **SAMUEL CRAIG MCDONALD,**
14 **#1753770**

15 **Defendant.**

CASE NO: C-18-334954-1

DEPT NO: X

16 **STATE'S NOTICE OF WITNESSES AND/OR EXPERT WITNESSES**
17 **[NRS 174.234]**

18 **TO: SAMUEL CRAIG MCDONALD, Defendant; and**

19 **TO: TEGAN MACHNICH, Deputy Public Defender, Counsel of Record:**

20 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the STATE OF
21 NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief:

22 **ACEVEDO, JESSICA, LVMPD #13770; is a forensic scientist and will testify**
23 **regarding the forensic DNA testing in this case and the results thereof.**

24 **BENJAMIN, JACLYN, MFS, 10430 Furnace Rd., Ste. 107, Lorton, VA; is a DNA**
25 **Analyst and Forensic Biology Analyst with Bode Cellmark Forensics. She will testify**
26 **regarding the forensic DNA testing in this case and the results thereof.**

27 **BRYANT, PORSHA (aka Portia); c/o CCDA – SVU/VWAC**

28 **CHURCHWOOD, H.; c/o Officer of the Inspector General, NV Department of Corrections**

COMISKEY, S.; LVMPD #6532

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1 COTTON, DONNEL; c/o CCDA – SVU/VWAC
2 COTTON-BRYANT, BETTY; 315 S. Locust, Compton, CA
3 CUSTODIAN OF RECORDS; CCDC
4 CUSTODIAN OF RECORDS; LVMPD Communications
5 CUSTODIAN OF RECORDS; LVMPD Records
6 DANNENBERGER, KIMBERLY, LVMPD #13772; is a forensic scientist and will
7 testify regarding CODIS and the procedures of the LVMPD forensic lab.
8 DETWEILER, W.; LVMPD #5460
9 GAUTHIER, KELLIE, LVMPD #8691; is the DNA manager for the LVMPD forensic
10 lab and will testify regarding the outsourcing of sexual assault kits, CODIS and the procedures
11 related thereto, and LVMPD's practices and procedures regarding DNA analysis.
12 GONZALEZ, A.; LVMPD #6188
13 HICKS, LAURA; 1700 Alta Dr., #2106, LVN
14 MCCOY, PEGGY, R.N., c/o Sunrise Hospital, 3186 S. Maryland Pkwy., LVN; is a
15 registered nurse and will testify regarding the medical examination and/or SCAN examination
16 conducted on the victim in this case.
17 MCGILL, JODI; CCDA Investigations
18 MORIARTY, S.; LVMPD #6358
19 OETTINGER, W.; LVMPD #4578
20 RICHTER, T.; LVMPD #4374
21 S.B.; c/o CCDA – SVU/VWAC
22 TOOLEY, S.; LVMPD #6224
23 ZACHARIAZ, J.; c/o Officer of the Inspector General, NV Department of Corrections
24 ZBIEGIEN, DR. MICHAEL, M.D., FAAP, c/o Sunrise Hospital, 3186 S. Maryland
25 Pkwy., LVN; is a medical doctor and will testify regarding the medical examination and/or
26 SCAN examination conducted on the victim in this case.
27 ///
28 ///

1 These witnesses are in addition to those witnesses endorsed on the Information or
2 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
3 Witnesses has been filed.

4 The substance of each expert witness's testimony and copy of all reports made by or at
5 the direction of the expert witness have been provided in discovery.

6 A copy of each expert witness's curriculum vitae, if available, is attached hereto.

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

9
10 BY /s/ Jacob J. Villani
11 JACOB J. VILLANI
12 Chief Deputy District Attorney
 Nevada Bar #011732

13
14
15
16
17
18 CERTIFICATE OF ELECTRONIC TRANSMISSION

19 I hereby certify that service of the above and foregoing was made this 5th day of
20 February, 2019, by electronic transmission to:

21 TEGAN MACHNICH, Deputy Public Defender
22 Email Address: tegan.machnich@clarkcountynv.gov

23 ANN McMAHAN, Legal Secretary
24 Email Address: mcmahaae@clarkcountynv.gov

25 BY: /s/ J. Georges
26 Secretary for the District Attorney's Office

27
28 jg/SVU

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
CURRICULUM VITAE**

Date: 03/08/2016

Name: Jessica M. Acevedo P#: 13770 Classification: Forensic Scientist II

Current Discipline of Assignment: Biology/DNA

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)			
Controlled Substances		Toxicology/Blood Alcohol	
Toolmarks		Toxicology/Breath Alcohol	
Trace Evidence		Toxicology/Drugs	
Arson Analysis		Firearms	
Latent Prints		Crime Scene Investigations	
Serology	X	Clandestine Laboratory Response Team	
Document Examination		DNA Analysis	X
Quality Assurance		Technical Support / DNA	
EDUCATION			
<i>Institution</i>	<i>Dates Attended</i>	<i>Major</i>	<i>Degree Completed</i>
University of Nevada Las Vegas	08/2002-05/2008	Biology/ Minor: Chemistry	BS
Community College of Southern Nevada	08/2005-05/2006		
University of Florida	05/2009-08/2009		
ADDITIONAL TRAINING / SEMINARS			
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>	
68 th Annual American Academy of Forensic Sciences Meeting	Las Vegas, NV	2/25/2016- 2/26/2016	
STRmix Training Workshop (Institute of Environmental Science & Research: Jo-Anne Bright)	Las Vegas, NV	9/17/2015-9/18/2015	
DNA Analyst Webinar Series: Probabilistic Genotyping & Software Programs (Part 1) (National Institute of Standards & Technology)	Las Vegas, NV	5/28/2014	
DNA Mixture Interpretation Workshop & Webcast (National Institute of Standards & Technology)	Las Vegas, NV	4/12/2013	
65 th Annual American Academy of Forensic Sciences Meeting	Washington D.C.	02/18/2013-02/22/2013	

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Science in the Courtroom: A Matter of Perspective Workshop (American Academy of Forensic Sciences)	Washington D.C.	02/2013
DNA in Real Time: Amplifying Productivity in Today's Forensic Laboratory Workshop (American Academy of Forensic Sciences)	Washington D.C.	02/2013
How to be a good expert witness (National Institute of Justice)	Las Vegas, NV	9/27/2012
Forensic Relationship Statistics Training (Marshall University: Kelly Beatty)	Las Vegas, NV	8/23/2012
Interpreting DNA Mixtures	Las Vegas, NV	01/25/2012
COURTROOM EXPERIENCE		
<i>Court</i>	<i>Discipline</i>	<i>Number of Times</i>
Clark County District Court	Serology and DNA	3
EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>
Las Vegas Metropolitan Police Department	Forensic Scientist II	07/2013- present
Las Vegas Metropolitan Police Department	Forensic Scientist I	07/2012-07/2013
Las Vegas Metropolitan Police Department	Forensic Scientist Trainee	07/2011- 07/2012
Las Vegas Metropolitan Police Department	Forensic Laboratory Aide	12/2008-07/2011
PROFESSIONAL AFFILIATIONS		
<i>Organization</i>	<i>Date(s)</i>	
None		
PUBLICATIONS / PRESENTATIONS:		
None		
OTHER QUALIFICATIONS:		

Jaclyn Benjamin

10430 Furnace Road, Suite 107 Lorton, VA 22079

(703) 646-9895

Jaclyn.Benjamin@bodetech.com

Education

The George Washington University, Washington, DC, May 2014

Master of Forensic Science, Concentration in Forensic Molecular Biology

Saginaw Valley State University, University Center, MI, December 2010

Bachelor of Science, Biology

Relevant

Work

Experience

Bode Cellmark Forensics

DNA Analyst II, June 2017-Present

DNA Analyst I, January 2017-June 2017

Forensic Biology Analyst II, June 2016- Present

Forensic Biology Analyst I, June 2014-June 2016

Duties:

- Screening evidence for body fluids (semen, blood, saliva) and analyzing hairs for nuclear/mitochondrial DNA suitability
- Processing casework samples
- Analyzing and interpreting DNA results using established interpretation guidelines
- Documenting and reporting Forensic Biology and DNA analysis results and conclusions
- Serological technical review of reports
- Training new analysts in forensic biology procedures
- Testifying as needed

The George Washington University, Department of Forensic Sciences

Graduate Research Assistant, August 2012 – May 2014

- Duties: Performing experiments on the NIJ grant-funded research project to develop a proximity ligation RT-PCR assay to detect spermatozoa in forensic samples by targeting sperm-specific proteins; troubleshooting experiments to optimize the assay
- Oral presentation: Detecting Spermatozoa using the Proximity Ligation Real Time PCR (PLiRT-PCR) Method, AAFS 66th Annual Scientific Meeting (2014)

Montgomery County Department of Police, Crime Lab, Forensic Biology

Internship Program, June 2013 – December 2013

- Project: Finalizing and troubleshooting validation studies on DNA extraction using the QIAcube robotic system, performed in order to utilize the system for casework
- Duties: DNA extraction using the QIAcube and manual Qiagen extraction procedure; quantitation using Quantifiler kit on ABI 7500; amplification with PowerPlex 16 STR kit on GeneAmp 9700; capillary electrophoresis on the 3130 Genetic Analyzer; electropherogram analysis using GeneMapper ID

The University of Pittsburgh, Department of Neurobiology

Research Technician II, August 2011 – August 2012

- Duties: Genotyping mouse colonies (non-organic extraction, PCR, gel electrophoresis); cell culturing including media preparation; DNA transfections; immunocytochemistry; immunohistochemistry; general lab ordering, organization and maintenance

Coursework

Satisfying

DAB

Guidelines

Undergraduate-Level Coursework	Graduate-Level Coursework
Genetics	Population Genetics
Biostatistics	
Biochemistry	
Molecular Biology	

Continuing Education

- Bode Mid-Atlantic: DNA & Investigators Conference; November 9, 2015
- Bode West: 13th Annual DNA Conference; March 21-24, 2016
- Bode East: 16th Annual DNA Conference; September 11-13, 2017
- Bode: 17th Annual Forensic DNA Conference; April 3-6, 2018

Testimony

- MD vs. Deshaune Darling, Circuit Court for Dorchester County, MD; September 15, 2015
- US vs. Frank Smith, Superior Court of the District of Columbia; February 10, 2016
- US vs. Ammanuel Asnake, Superior Court of the District of Columbia; March 8, 2016
- WV vs. Brian Cook Jr., Circuit Court of Berkeley County, WV; March 14, 2016
- MD vs. Walter McMillan Dorsey, Circuit Court of Harford County, MD; August 5, 2016
- US vs. Jibril Abdul-muwwakil, Superior Court of the District of Columbia; October 27, 2016
- MD vs. Edward Witherspoon, Circuit Court for Howard County, MD; May 10, 2017
- MD vs. Craig Dennis White, Circuit Court for Howard County, MD; September 25, 2017
- US vs. Michael Coleman, Superior Court of the District of Columbia; October 18, 2017
- TX vs. John Dee Weter, 359th Judicial District Court Montgomery County, TX; May 9, 2018

Publications

- S. Riman, C.H. Shek, V. Clermont Beaudoin, M. Peck, **J. Benjamin**, C. Ayoub, L. Prugh, D. Podini, Confirmatory detection of sperm and semen Via proximity ligation real-time PCR, Forensic Sci. Int. Genet. Suppl. Ser. 5 (2015) e109-e111.

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
CURRICULUM VITAE**

Date: 05/30/2017

Name: Kimberly Dannenberger P#: 13772 Classification: Forensic Scientist II

Current Discipline of Assignment: Biology/DNA

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)			
Controlled Substances		Toxicology/Blood Alcohol	
Toolmarks		Toxicology/Breath Alcohol	
Trace Evidence		Toxicology/Drugs	
Arson Analysis		Firearms	
Latent Prints		Crime Scene Investigations	
Serology	X	Clandestine Laboratory Response Team	
Document Examination		DNA Analysis	X
Footwear Impressions		Technical Support / Quality	
Quality Assurance			
EDUCATION			
<i>Institution</i>	<i>Dates Attended</i>	<i>Major</i>	<i>Degree Completed</i>
University Nevada, Reno	08/2002-05/2003	Nutritional Sciences	No
University Nevada, Las Vegas	08/2003-05/2008	Cell/ Molecular Biology	Yes
ADDITIONAL TRAINING / SEMINARS			
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>	
STRmix Training Workshop	LVMPD Forensic Lab Las Vegas, NV	04.24.2017 – 04.28.2017	
2017 Annual Review of DNA Data Accepted at NDIS	Online	12.16.2016	
QAS Auditor Training	Online	10/21/2016 – 10/26/2016	

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
LVMPD Forensic Laboratory Internal Auditor training	Las Vegas, NV	06.22.2016
2016 Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV	04.04.2016
CJIS Security Awareness Training	Las Vegas, NV (online)	11.12.2015
LSU Instructor Development Workshop	Las Vegas, NV	10.12.2015-10.14.2015
STRMIX Training	Las Vegas, NV	09.17.2015-09.18.2015
AAFS Conference: Scientific Neutrality in Expert Witness Testimony & Obtaining Successful DNA profiles from Challenging Samples	Orlando, FL	02.16.2015-02.21.2015
2015 Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV	02.03.2015
NIST DNA Analyst Webinar Series: Validation Concepts and Resources (Part 1)	Las Vegas, NV	08.06.2014
NIST DNA Analyst Webinar Series: Probabilistic Genotyping and Software Programs (Part 1)	Las Vegas, NV	05.28.2014
2014 Annual Review of DNA Data accepted at NDIS	Las Vegas, NV	12.23.2013
Technical & Administrative Review Training to Make Casework Easier	Las Vegas, NV	10.15.2013
2013 Annual Review of DNA Data accepted at NDIS	Las Vegas, NV (online)	04.23.2013
NIST DNA Mixture Interpretation Workshop	Webcast – NIST	04.12.2013
AAFS Conference: Science in the Courtroom, DNA in Real Time: Amplifying Productivity in today's Forensic Laboratory, and general session talks	Washington D.C.	02.18.2013-02.23.2013
Promega Conference: How to tackle a DNA backlog, Mixture interpretation workshop, and general session talks	Nashville, TN	10/14/12 – 10/18/12

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Forensic relationship statistic training	Las Vegas, NV	08/23/12
Interpreting DNA Mixtures	Las Vegas, NV	01/25/12
Annual Review of NDIS	Las Vegas, NV	01/19/12
Emerging DNA Technologies	Huntington, WV	12/05/11-12/07/11
2011 NSDAI Quarterly Training	Las Vegas, NV	07/13/11
Testifying in Court	Las Vegas, NV	05/02/11
NCIC Training	Las Vegas, NV	09/24/10
Driver's Training	Las Vegas, NV	04/09
New Hire Orientation	Las Vegas, NV	01/09
COURTROOM EXPERIENCE		
<i>Court</i>	<i>Discipline</i>	<i>Number of Times</i>
Grand Jury	Biology/DNA	3
District Court	Biology/DNA	12
Justice Court	Biology/DNA	1
US Federal Court	Biology/DNA	2
EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>
Las Vegas Metropolitan Police Department	Forensic Scientist II	03/14 - Present
Las Vegas Metropolitan Police Department	Forensic Scientist I	03/12 – 03/14
Las Vegas Metropolitan Police Department	Forensic Scientist Trainee	03/11 – 03/12
Las Vegas Metropolitan Police Department	Forensic Lab Aide	12/08-03/11
PROFESSIONAL AFFILIATIONS		
<i>Organization</i>	<i>Date(s)</i>	

PROFESSIONAL AFFILIATIONS	
<i>Organization</i>	<i>Date(s)</i>
American Academy of Forensic Science – Associate Member	02-2014-present
American Academy of Forensic Science – Trainee Affiliate	02.2013 – 02.2014
PUBLICATIONS / PRESENTATIONS:	
<ul style="list-style-type: none"> - Teaching DNA Overview and Buccal Swab Collections class to members of the Law Enforcement Community. 2012 – present - Teaching the DNA portion of the CSA Academy. 2015 – present - Providing presentation to various organizations within the Las Vegas Community that cover the Forensic Laboratory as a whole and DNA specific. This includes schools and community groups. 2012 - present 	
OTHER QUALIFICATIONS:	

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
FORENSIC LABORATORY
CURRICULUM VITAE**

Date: 05/01/17

Name: Kellie M. (Wales) Gauthier

P#: 8691

Classification: Biology/DNA Forensic Lab
Manager

Current Discipline of Assignment: DNA/Biology Detail

EXPERIENCE IN THE FOLLOWING DISCIPLINE(S)			
Controlled Substances		Toxicology/Blood Alcohol	
Toolmarks		Toxicology/Breath Alcohol	
Trace Evidence		Toxicology/Drugs	
Arson Analysis		Firearms	
Latent Prints		Crime Scene Investigations	
Serology	X	Clandestine Laboratory Response Team	
Document Examination		DNA Analysis	X
Quality Assurance		Technical Support / DNA	X
EDUCATION			
<i>Institution</i>	<i>Dates Attended</i>	<i>Major</i>	<i>Degree Completed</i>
University of West Florida	8/98 - 5/02	Biology	B.S.
ADDITIONAL TRAINING / SEMINARS			
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>	
STRmix Training Workshop	Las Vegas, NV	04/24/17-04/28/17	
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	12/16/16	
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	03/07/16	
DNA Statewide Meeting	Las Vegas, NV	02/22/16	
STRmix	Las Vegas, NV	09/17/15-09/18/15	
Conference: 2015 ASCLD Symposium	Washington, DC	04/26/15-04/30/15	

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Workshop: DNA Mixture Interpretation	Washington, DC	04/27/15
Workshop: Management of Federal Awards for Forensic Science Laboratories	Washington, DC	04/27/15
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	01/15/15
Fair and Impartial Policing	Las Vegas, NV	11/26/14
ICS 700: National Incident Management System (FEMA 700)	Las Vegas, NV (Online Course)	10/05/14
ICS 200: Incident Command System (FEMA 200)	Las Vegas, NV (Online Course)	10/05/14
STRmix Training Workshop	Las Vegas, NV	09/22/14-09/25/14
ICS 100: Incident Command Systems (FEMA100)	Las Vegas, NV (Online Course)	08/31/14
2014 Biennial Inclusive Leadership	Las Vegas, NV	08/29/14
Understanding Death and Grief	Las Vegas, NV	08/20/14
EEOC for Supervisors	Las Vegas, NV	02/12/14
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	12/17/13
Leadership Inside Out	Las Vegas, NV	12/12/13
CJIS Security Awareness Training	Las Vegas, NV	12/11/13
19 th National CODIS Conference	Norman, OK	11/19/13-11/20/13
Communication Skills	Las Vegas, NV	10/16/13
Technical & Admin. Review Training	Las Vegas, NV	10/15/13
Workshop: Advanced Topics in Forensic Mixture Analysis: Statistics to Technology	Atlanta, GA	10/07/13
Conference: 24 th International Symposium on Human Identification	Atlanta, GA	10/7/13-10/10/13
Step-Up Mentoring Program - Mentor	Las Vegas, NV	09/12/13

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Stress Management for Supervisors	Las Vegas, NV	09/11/13
Acting Supervisor Skills	Las Vegas, NV	09/04/13
DNA Mixture Interpretation Workshop & Webcast	Las Vegas, NV	04/12/13
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	04/03/13
Internal Auditing to ISO/IEC 17025	Las Vegas, NV	03/11/13-03/13/13
18 th National CODIS Conference	Norman, OK	11/13/12-11/14/12
Forensic Relationship Statistics Training	Las Vegas, NV	08/12
Leadership and Supervisory Skills for Women	Las Vegas, NV	03/27/12
CODIS 7.0 Computer Based Training (CBT) and Instructor Led Training (ILT)	Portland, OR	03/20/12-03/22/12
California Association for Crime Laboratory Directors (CACLD)	Las Vegas, NV	03/08/12
How to Be a Super Communicator	Las Vegas, NV	01/18/12
Interpreting DNA Mixtures	Las Vegas, NV	01/25/12
CODIS 7.0 Computer Based Training	Las Vegas, NV	01/12
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	12/28/11
17 th National CODIS Conference	Jacksonville, FL	11/14/11-11/16/11
Quality Assurance Standards/Auditor Training	Las Vegas, NV	02/22/11
CSI Effect: Maximizing The Potential Of Forensics DNA	Las Vegas, NV	02/03/11
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	01/05/11
DNA Mixture Interpretation and Statistics	Las Vegas, NV	07/15/10
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	01/10
ASCLD/LAB- International Preparation Course	Henderson, NV	12/01/09-12/03/09

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Cold Case Analysis Training	Chicago, IL	07/15/09-07/16/09
Hair Evaluation for DNA Analysis	Las Vegas, NV (Online Course)	01/14/09
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV (Online Course)	11/18/08
Seminar: The Parachute Case	Washington DC	02/22/08
Seminar: Bringing Forensic Science to the Battlefield	Washington DC	02/21/08
Seminar: Human Identification in a Post 9/11 World	Washington DC	02/20/08
Workshop: DNA Mixture Interpretation	Washington DC	02/19/08
Conference: American Academy of Forensic Sciences 60 th Annual Meeting	Washington DC	02/19/08-02/23/08
Annual Review of DNA Data Accepted at NDIS	Las Vegas, NV	01/31/08
Applied Biosystems Training on 3130xl Genetic Analyzer	Las Vegas, NV	11/01/07
Workshop: Forensic DNA Profiling	Las Vegas, NV	01/25/07-01/26/07
Workshop: Forensic Population Genetics and Statistics	Las Vegas, NV	11/27/06
FBI CODIS Training	McLean, VA	11/06
Conference: Bode Advanced DNA Technical Workshop	Captiva Island, FL	06/06
Workshop: Presenting Statistics in the Courtroom	Captiva Island, FL	06/06
Training: Differential Extraction	Las Vegas, NV	06/06
Training: Serological Techniques and DNA Screening - Colleen Proffitt, MFS	Las Vegas, NV	5/06
Conference: American Academy of Forensic Sciences 58 th Annual Meeting	Seattle, WA	2/20/06-2/25/06
Seminar: Racial Profiling SNP's	Seattle, WA	2/23/06

ADDITIONAL TRAINING / SEMINARS		
<i>Course / Seminar</i>	<i>Location</i>	<i>Dates</i>
Seminar: The Atypical Serial Killer	Seattle, WA	2/22/06
Seminar: Bioterrorism Mass Disasters	Seattle, WA	2/21/06
Workshop: Sexual Homicide - Fantasy Becomes Reality	Seattle, WA	2/21/06
Workshop: Advanced Topics in STR DNA Analysis	Seattle, WA	2/20/06
National Incident Management System (NIMS) an Introduction	Las Vegas, NV	8/05
Drivers Training II	Las Vegas, NV	7/05
Workshop: Future Trends in Forensic DNA Technology - Applied Biosystems	Orlando, FL	9/04
Workshop: Southern Association of Forensic Scientists (SAFS) - Paternity Index DNA Statistics	Orlando, FL	9/04
Workshop: Forensic Epidemiology - Joint Training for Law Enforcement Hazardous Materials and Public Health Officials on Investigative Response to Bio-terrorism	Orlando, FL	7/04
Forensic Technology Training - Florida Department of Law Enforcement	Orlando, FL	4/04
Biology Discipline Meeting	Tampa, FL	3/04
Workshop: Future Trends in Forensic DNA Technology - Applied Biosystems	Orlando, FL	9/03
COURTROOM EXPERIENCE		
<i>Court</i>	<i>Discipline</i>	<i>Number of Times</i>
Clark County: Justice, District	DNA	60
EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>
Las Vegas Metropolitan Police Department	Biology/DNA Forensic Lab Manager	05/14 - present
Las Vegas Metropolitan Police Department	Forensic Scientist	5/05 – 05/14

EMPLOYMENT HISTORY		
<i>Employer</i>	<i>Job Title</i>	<i>Date</i>
Florida Dept. of Law Enforcement	Forensic Technologist	8/03 - 5/05
PROFESSIONAL AFFILIATIONS		
<i>Organization</i>	<i>Date(s)</i>	
American Academy of Forensic Sciences - Trainee Affiliate	10/06 - 12/09	
PUBLICATIONS / PRESENTATIONS:		
None		
OTHER QUALIFICATIONS:		
None		

Curriculum Vitae

MICHAEL STEVEN ZBIEGNIEN, M.D.; FAAP

Sunrise Children's Hospital
Department of Emergency Medicine
3186 South Maryland Parkway
Las Vegas, Nevada 89109

CURRENT POSITION

Medical Director; Emergency Services
Attending Physician
Sunrise Children's Hospital
Las Vegas, Nevada
1997 to Present

Medical Director; "Kids Line"
Pediatric Advice Telephone Service
Sunrise Children's Hospital
Las Vegas, Nevada
1997 – Present

Medical Director; SCAN Team
Sunrise Children's Hospital
1997 – Present

PAST POSITIONS

St. John Hospital and Medical Center
Detroit, Michigan
Department of Emergency Medicine – Attending
Physician
Department of Pediatrics – Attending Physician
July 1995 to September 1997

Botsford General Hospital
Farmington Hills, Michigan
Department of Pediatrics – Attending Physician

Children's Hospital of Michigan
Detroit, Michigan
Division of Emergency Medicine – Attending
Physician
July 1993 to June 1995

Children's Hospital of Michigan
Pediatric Urgent Care Center

MICHAEL STEVEN ZBIEGIEN
Curriculum Vitae
Page -1-

Southfield, Michigan
Attending Physician
1992 to 1995

St. Thomas Hospital
St. Thomas, United States Virgin Islands
Dept. of Emergency Medicine – Attending Physician
August 1986 through May 1988

**POST GRADUATE
TRAINING**

Pediatric Emergency Medicine Fellow
Children's Hospital of Michigan
Detroit Medical Center
Wayne State University School of Medicine
Detroit, Michigan
July 1991 through June 1993

Pediatrics – Cooper Hospital/UMC
Camden, New Jersey
University of Medicine and Dentistry of New Jersey
PGY I through PGY III
July 1988 through June 1991

DEGREES

American University of the Caribbean
Coral Gables, Florida & Montserrat, BWI
Doctor of Medicine, 1986

Illinois, Benedictine College
Lisle, Illinois
Bachelor of Science in Biology 1993

**PUBLICATIONS &
PRESENTATIONS**

Acute Epiglottitis in the Infant: Presentation and Treatment
Zbiegien MS, Schaffer SR, Sweeney RL
Presented in part at the Eastern Section Meeting of
The American Laryngological, Rhinological, and
Osteological Society
February 1991

Morbidity and Mortality of Pediatric Thoracic Trauma
Zbiegien MS, Ross S, Sweeney RL
Presented in part at the National Conference of
Pediatric Trauma
September 1992

MICHAEL STEVEN ZBIEGIEN
Curriculum Vitae
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**AWARDS &
HONORS**

Distinguished Teaching Award 1989 % 1990
University of Medicine and Dentistry of New Jersey
Phi Lambda Kappa Medical Honor Society
Tri-Beta National Biology Honor Society

**PREVIOUS
ADMINISTRATIVE
DUTIES**

Emergency Center Quality Assurance Committee –
St. John Hospital
Emergency Center Improvement Council - St. John
Hospital
Physician Paging Continuous Quality Improvement –
St. John Hospital
Emergency Center Admitted Patient Turn-Around
Time Continuous Quality Improvement –
St. John Hospital
Emergency Center Non-Admitted Patients Turn-
Around Time Continuous Quality Improvement
– St. John Hospital
Physicians and the Internet Instructor - St. Johns
Hospital
Physician In Charge – Resident / Attending Physician
Evaluations St. John Hospital
Physician In Charge – Pediatrics Emergency
Medicine Research Projects St. John Hospital
Physician In Charge – Pediatric in House Coverage –
Botsford Hospital

ASSOCIATIONS

American Academy of Pediatrics
American Academy of Pediatrics
Subchapter – Emergency Medicine
American College of Emergency Physicians
American Medical Association
National Medical & Dental Association
Society for Academic Medicine

**ADDITIONAL
QUALIFICATIONS**

Assistant Professor – Pediatrics
University of Nevada School of Medicine

Assistant Professor – Pediatrics
Wayne State University School of Medicine

Assistant Professor – Emergency Medicine
Wayne State University School of Medicine

MICHAEL STEVEN ZBIEGIEN
Curriculum Vitae
Page -3-

Assistant Clinical Professor - Pediatrics
American Board of Pediatrics

Board Eligible – Pediatrics Emergency Medicine
American Board of Pediatrics
American Board of Emergency Medicine

Basic Life Support Certified
Advanced Cardiac Life Support Certified
Pediatric Advanced Life Support Instructor – Certified
Neonatal Advanced Life Support – Certified
Michigan Medical License # 4301058091
US Virgin Islands Federal Medical License #928
Nevada Medical License # 8319
Fluency in the Polish Language
Computer Literate



0026
DARIN F. IMLAY, PUBLIC DEFENDER
NEVADA BAR NO. 5674
TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Tegan.Machnich@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-18-334954-1
)	
v.	)	DEPT. NO. X
)	
SAMUEL MCDONALD,)	
)	
Defendant,	)	DATE: February 25, 2019
	)	TIME: 8:30 a.m.

MOTION TO CONTINUE TRIAL DATE
[UNOPPOSED]

COMES NOW the Defendant, SAMUEL MCDONALD, by and through his attorney, TEGAN C. MACHNICH, Deputy Public Defender, and respectfully moves this court for an order vacating the March 4, 2019 trial date and requesting a new trial setting on a date convenient to the court.

This Motion is made based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, Memorandum of Points and Authorities in support hereof, and oral argument at the time set for hearing this Motion.

DATED this 12th day of February, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff;

YOU WILL PLEASE TAKE NOTICE that the foregoing MOTION TO CONTINUE TRIAL DATE will be heard on February 25, 2019, at 8:30 a.m. in District Court, Department X.

DATED this 12th day of February, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing Motion to Continue Trial Date (unopposed) was served via electronic e-filing to the Clark County District Attorney's Office on this 12th day of February, 2019.

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office

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Steven D. Grierson

1 STEVEN B. WOLFSON
2 Clark County District Attorney
3 Nevada Bar #001565
4 JACOB J. VILLANI
5 Chief Deputy District Attorney
6 Nevada Bar #11732
7 200 Lewis Avenue
8 Las Vegas, Nevada 89155-2212
9 (702) 671-2500
10 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 SAMUEL MCDONALD,
13 #1753770

14 Defendant.

CASE NO: C-18-334954-1

DEPT NO: X

15 RECEIPT OF COPY FOR DISCOVERY PROVIDED

16
17 RECEIPT OF COPY of the foregoing DISCOVERY:

- 18 1. One DVD labeled "DNA Case Record & Raw Data, PT Summaries, Manuals"
19 dated 1-16-2019.

20
21 is hereby acknowledged this 20th day of February, 2019.

22 PUBLIC DEFENDER
23 ATTORNEY FOR DEFENDANT

24
25 BY *Heaven Proctor*
26

27
28 jv/SVU



1 STEVEN B. WOLFSON
Clark County District Attorney
2 Nevada Bar #001565
JACOB J. VILLANI
3 Chief Deputy District Attorney
Nevada Bar #11732
4 200 Lewis Avenue
Las Vegas, Nevada 89155-2212
5 (702) 671-2500
Attorney for Plaintiff
6

7 DISTRICT COURT
CLARK COUNTY, NEVADA
8

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

CASE NO: C-18-334954-1

12 SAMUEL MCDONALD,
#1753770

DEPT NO: X

13 Defendant.
14

15 RECEIPT OF COPY FOR DISCOVERY PROVIDED
16

17 RECEIPT OF COPY of the foregoing DISCOVERY:

- 18 1. One DVD labeled "Discovery Request 3-4-2019 Bode Case #: NVK1606-
19 1496."
20 2. Accompanying letter (2 pages) from Bode Technology dated March 4, 2019.

21 is hereby acknowledged this 11th day of March, 2019.
22

23 PUBLIC DEFENDER
ATTORNEY FOR DEFENDANT
24

25 BY Neelon Proctor
26
27

28 jv/SVU



0026
DARIN F. IMLAY, PUBLIC DEFENDER
NEVADA BAR NO. 5674
TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Tegan.Machnich@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-18-334954-1
)	
v.	)	DEPT. NO. X
)	
SAMUEL MCDONALD,)	
)	
Defendant,	)	DATE: May 22, 2019
	)	TIME: 8:30 a.m.

MOTION TO CONTINUE TRIAL DATE

COMES NOW the Defendant, SAMUEL MCDONALD, by and through his attorney, TEGAN C. MACHNICH, Deputy Public Defender, and respectfully moves this court for an order vacating the July 15, 2019 Calendar Call and July 22, 2019 trial dates and requesting a new trial setting on December 9, 2019 (or on a date subsequent thereto that is convenient to the court).

This Motion is made based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 3rd day of May, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff;

YOU WILL PLEASE TAKE NOTICE that the foregoing MOTION TO CONTINUE TRIAL DATE will be heard on May 22, 2019, at 8:30 a.m. in District Court, Department X.

DATED this 3rd day of May, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing Motion to Continue Trial Date was served via electronic e-filing to the Clark County District Attorney's Office on this 3rd day of May, 2019.

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office



1 NOTC
2 DARIN F. IMLAY, PUBLIC DEFENDER
3 NEVADA BAR NO. 5674
4 TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 11642
6 **PUBLIC DEFENDERS OFFICE**
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 Tegan.Machnich@clarkcountynv.gov
12 *Attorneys for Defendant*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 THE STATE OF NEVADA,)	
)	
16 Plaintiff,	)	CASE NO. C-18-334954-1
)	
17 v.	)	DEPT. NO. X
)	
18 SAMUEL MCDONALD,)	
)	
19 Defendant,)	
)	

20 **DEFENDANT'S NOTICE OF EXPERT WITNESSES, PURSUANT TO NRS 174.234(2)**

21 TO: CLARK COUNTY DISTRICT ATTORNEY:

22 You, and each of you, will please take notice that the Defendant, SAMUEL
23 MCDONALD, intends to call the following expert witnesses in his case in chief:

24 **Dr. Nora Rudin** – Dr. Rudin is an expert in the area of forensic DNA analysis.
25 She will testify concerning the typical and possible DNA analysis performed in a criminal sexual
26 assault case, as well the specific analysis performed in the instant matter. Her review of materials
27 includes the LVMPD forensic file as well as the forensic file from Bode pertaining to this case.

28 CV attached hereto.

DATED this 18th of November, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Chief Deputy Public Defender

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183 - 184
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MOT
DARIN F. IMLAY, PUBLIC DEFENDER
NEVADA BAR NO. 5674
TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Tegan.Machnich@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-18-334954-1
)	
v.	)	DEPT. NO. X
)	
SAMUEL MCDONALD,)	
)	
Defendant,	)	DATE: December 2, 2019
	)	TIME: 8:30 a.m.

MOTION TO COMPEL PRODUCTION OF DISCOVERY & BRADY MATERIAL

Defendant, SAMUEL MCDONALD, through counsel, TEGAN C. MACHNICH, Deputy Public Defender, hereby requests this Honorable Court to order the State of Nevada to produce the discovery and Brady material discussed herein **at least 30 days before trial** pursuant to NRS 174.235; NRS 174.285; Kyles v. Whitley, 514 U.S. 419 (1995); Brady v. Maryland, 373 U.S. 83 (1963) (and their progeny).

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel and Memorandum of Points and Authorities, and oral argument at the time set for hearing this Motion.

DATED this 20th day of November, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 Defendant Samuel McDonald is awaiting trial on two counts of Sexual Assault with a
4 Minor under the Age of Fourteen. The State has alleged that Mr. McDonald forced his
5 girlfriend's son, a nine-year old named S.B., to perform fellatio on him and engage in anal
6 intercourse on or about December 27, 2001. According to the original police report dated
7 December 28, 2001, Mr. McDonald took the then nine (9) year old complainant S.B. to the gym
8 in his apartment complex around noon. At the time, Mr. McDonald and S.B.'s sister, Laura
9 Hicks, were in a relationship. Betty Cotton, S.B. and Ms. Hicks' mother, was visiting from
10 California for the holidays. All parties were staying at 1700 Alta, Apt. 2106, Las Vegas, NV,
11 89106. This address was leased to Mr. McDonald.

12 S.B. disclosed the alleged sexual abuse in the evening hours of December 27, 2001, at
13 which time his mother brought him to Sunrise Hospital for an exam. Police were contacted by
14 Sunrise Hospital in the early morning hours of December 28, 2001.

15 Detective Richter of the Las Vegas Metropolitan Police Department unofficially (upon
16 information and belief) interviewed Ms. Cotton and S.B. at Sunrise Hospital on December 28,
17 2001. Doctors also completed a sexual assault examination that, according to Detective Richter's
18 report, came back "positive". Police were provided with Mr. McDonald's full legal name,
19 description and address. Upon information and belief, he was a registered felon / sex offender at
20 the time. Following the initial interviews and exam results, Detective Richter indicates that he
21 notified Sergeant Williams of the LVMPD Sexual Assault Detail.

22 Based upon discovery provided to date, LVMPD detectives stopped working on the case
23 and did not attempt to locate Mr. McDonald despite having ample information to do so. They
24 could have run SCOPE, or even checked the local sex offender registration. Instead, the next
25 provided report is from Bode Cellmark Forensics on March 20, 2017. Police then interviewed a
26 now-grown S.B. and Mr. McDonald. Ultimately this case was filed.

ARGUMENT

Prior to trial, prosecutors are required to disclose both inculpatory and exculpatory information within their actual or constructive possession.

I. Prosecutors must Disclose *Inculpatory* Evidence

NRS 174.235 requires prosecutors to disclose evidence “within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known,” including:

- The defendant’s written or recorded statements or confessions,
- Any witness’s written or recorded statements the prosecuting attorney intends to call during the witness during the State’s case in chief,
- Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case,¹ and
- Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the State’s case in chief.

NRS 174.235(1)(a)-(c).

A. Prosecutors must disclose all inculpatory evidence, regardless of whether the material is intended for use in the government’s case in chief

Prosecutors may not lawfully withhold inculpatory information from the defense simply because they do not intend to present the information in the government’s case-in-chief. State v. Harrington, 9 Nev. 91, 94 (1873); People v. Carter, 312 P.2d 665, 675 (Cal.1957); People v. Bunyard, 756 P.2d 795, 809 (Cal. 1988). Any holding to the contrary would allow prosecutors to engage in unfair surprise by withholding inculpatory material from the government’s case-in-chief, only to surprise the defense by using it in rebuttal. Thus, prosecutors must disclose all

¹ This includes medical data, imaging, films, reports and slides, histological, colposcopic, or otherwise. The right to counsel guaranteed by the Sixth Amendment obligates defense counsel to conduct “an adequate pre-trial investigation into . . . medical evidence.” Gersten v. Senkowski, 426 F.3d 588, 605 (2d Cir. 2005). This duty includes obtaining and reviewing pertinent medical imaging even if the testing reveals no significant findings. Id. at 605, 607-10 (discussing the exculpatory nature of “normal” medical examinations in cases in which a complainant alleges physical harm). Thus, the discovery obligations set forth in NRS 174.235(2) require prosecutors to disclose physical imaging and testing.

1 inculpatory evidence of which they are actually or constructively aware, including material not
2 necessarily intended for introduction in the prosecution's case-in-chief.

3 B. Fundamental fairness requires that NRS 174.235 be interpreted to encompass all
4 statements made by a defendant, regardless of whether they are reduced to writing or
5 recorded

6 While NRS 174.235 obligates prosecutors to disclose a defendant's written or recorded
7 statements, fundamental fairness requires disclosure of unrecorded statements and statements for
8 which a defendant can be held vicariously liable.² Courts have recognized the fundamental
9 fairness involved in "granting the accused equal access to his own words, no matter how the
10 government came by them." U.S. v. Caldwell, 543 F.2d 1333, 1353 (D.D.C. 1974). This
11 includes allowing an accused access to his unrecorded words, including adoptive or vicarious
12 admissions. Since these admissions are admissible at trial whether recorded or not, NRS
13 174.235 must be construed to require pretrial disclosure of any unrecorded statements or
14 admissions, including those for which the defendant can be held vicariously liable.

15 **II. Prosecutors Must Disclose Exculpatory Evidence as Required by the U.S. and** 16 **Nevada Constitutions**

17 The United States and Nevada Constitutions require prosecutors to disclose all
18 exculpatory information of which they are actually or constructively aware. U.S. Const. Amend.
19 V, VI, XIV; Nev. Const. Art. 1, Sect. 8; Brady v. Maryland, 373 U.S. 83 (1963); Kyles v.
20 Whitley, 514 U.S. 419, (1995). A prosecutor's failure to disclose exculpatory evidence violates
21 the Due Process Clause. Jimenez v. State, 112 Nev. 610, 618 (1996). A due process violation
22 occurs when exculpatory evidence is withheld, regardless of the prosecution's motive. Jimenez,
23 112 Nev. 610.

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27 ² NRS 51.035(3)(a)-(e) provides that a defendant can be held vicariously liable for
28 statements made by third parties. See also Fields v. State, 129 Nev. 785 (2009) (finding
evidence of defendant's silence following wife's complaint that she was in jail because of his
conduct admissible as an adoptive admission).

1 A. Brady Places Broad Disclosure Obligations on Prosecutors, Questions About Which Must
2 Be Resolved In Favor Of Disclosure

3 Exculpatory evidence is information favorable to the defendant that is material to the
4 issue of guilt or punishment. U.S. v. Bagley, 473 U.S. 667, 675 (1985). Evidence is material
5 and favorable to the accused if its non-disclosure undermines confidence in the outcome of the
6 trial. Kyles, 514 U.S. at 434-35. This evidence must be disclosed even in the absence of a Brady
7 request.³ Bagley, 473 U.S. at 680-82.

8 Ultimately, prosecutors are tasked with a “broad duty of disclosure.” Strickler, 527 U.S.
9 at 281; cf. U.S. v. Agurs, 427 U.S. 97, 108 (1976) (holding that “the prudent prosecutor will
10 resolve doubtful questions in favor of disclosure”). As the Nevada Supreme Court has
11 explained:

12 Due process does not require simply the disclosure of “exculpatory” evidence.
13 Evidence also must be disclosed if it provides grounds for the defense to attack the
14 reliability, thoroughness, and good faith of the police investigation, to impeach the
15 credibility of the state’s witnesses, or to bolster the defense case against
 prosecutorial attacks. Furthermore, “discovery in a criminal case is not limited to
 investigative leads or reports that are admissible in evidence.” Evidence “need not
 have been independently admissible to have been material.”

16 Mazzan v. Warden, 116 Nev. 48, 67 (2000) (internal citations omitted). Thus, any question as to
17 whether certain material, information, or evidence falls within the purview of Brady should be
18 resolved in favor of disclosure. Agurs, 427 U.S. at 108; see also Kyles, 514 U.S. at 439 (“a
19 prosecutor anxious about tacking too close to the wind will disclose a favorable piece of
20 evidence.”).

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24 ³ However, a specific Brady request changes the standard of review on appeal. When a
25 defendant makes a specific request, a reversal is warranted when “there exists a reasonable
26 *possibility* that the claimed evidence would have affected the judgment of the trier of fact.”
27 Jimenez, 112 Nev. 619; State v. Bennett, 119 Nev. 589 (2003). However, absent a specific
28 request, reversal is warranted, “if there exists a reasonable *probability* that, had the evidence
 been disclosed, the result of the proceeding would have been different.” Bagley, 473 U.S. at
 667, 682, 685; Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1986). A reasonable probability is a
 probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 678, 685;
 Ritchie, 480 U.S. at 57.

1 B. Favorable Evidence Includes Impeachment Information

2 The Due Process Clause of the Fifth and Fourteenth Amendments requires prosecutors to
3 disclose “any information about its witnesses that could cast doubt on their credibility.” U.S. v.
4 Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992). A witness can be attacked by “revealing possible
5 biases, prejudices, or ulterior motives of the witnesses as they may relate directly to issues or
6 personalities in the case at hand. The partiality of a witness is . . . always relevant [to]
7 discrediting the witness and affecting the weight of his testimony.” Davis, 415 U.S. at 316; see
8 also Lobato v. State, 120 Nev. 512 (2004) (discussing the nine basic modes of impeachment).
9 Accordingly, favorable evidence includes impeachment information pertaining to all government
10 witnesses. Giglio v. U.S., 405 U.S. 150, 154 (1972); Youngblood v. West Virginia, 547 U.S.
11 867 (2006); U.S. v. Bagley, 473 U.S. at 676 (requiring disclosure of all impeachment evidence).

12 *1. Impeachment information includes cooperation agreements and benefits*

13 Impeachment information includes all cooperation agreements between a government
14 witness and prosecutors. Giglio v. U.S., 405 U.S. 150, 154 (1972) (requiring disclosure of
15 cooperation agreement between government witness and prosecutors). It also includes benefits
16 provided to a government witness, regardless of whether an explicit deal is outlined. Browning
17 v. State, 120 Nev. 347, 369 (2004). It is the witness’s own anticipation of reward, not the intent
18 of the prosecutor, which gives rise to the required disclosure. Moore v. Kemp, 809 F.2d 702,
19 726, 729-30 (11th Cir. 1987); Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989)
20 (noting that agreements need not be express or formal arrangements, and recognizing favorable
21 treatment that is merely implied, suggested, insinuated, or inferred to be of possible benefit to a
22 witness constitutes proper material for impeachment).

23 Notably, benefits are not limited to agreements made in relation to the case in which they
24 are sought. Jimenez, 112 Nev. at 622-23. Benefits include evidence that a witness acted as a
25 paid informant on one or more occasions. State v. Bennett, 119 Nev. 589, 603 (2003).
26 Additionally, benefits include travel and lodging compensation, immigration assistance of any
27 kind, whether actual or anticipatory, as well as counseling, treatment, or other assistance
28

1 provided to any witness. These benefits are relevant to issues regarding possible bias,
2 credibility, and motive to lie, all of which constitute impeachment evidence. Davis v. Alaska,
3 415 U.S. 308 (1974).

4 *2. A witness's criminal history constitutes impeachment information*

5 Impeachment information includes evidence relating to a witness's criminal history.
6 Briggs v. Raines, 652 F.2d 862, 865-66 (9th Cir. 1981). Under Brady, prosecutors must produce
7 criminal histories useful to demonstrating a witness's history of, or propensity for, a relevant
8 character trait. Id. Prosecutors must also produce criminal histories disclosing a witness's bias,
9 prejudice or motive to lie. Davis, 415 U.S. at 354.

10 A witness's entire criminal record should be disclosed, even if it is more than ten years
11 old. Moore, 809 F.2d 702. Prosecutors are often under the mistaken impression that they must
12 disclose only felony convictions within the last ten years that can be utilized for impeachment
13 under NRS 50.095. However, in Davis, the U.S. Supreme Court found that a witness can be
14 attacked by "revealing possible biases, prejudices, or ulterior motives The partiality of a
15 witness is . . . always relevant [to] discrediting the witness and affecting the weight of his
16 testimony." 415 U.S. at 354 (internal quotations omitted). The Davis Court found that the
17 policy interest in protecting offender records must yield to the defendant's right to cross-examine
18 as to bias. Id. at 356; see also Lobato v. State, 120 Nev. 512 (2004), discussing the "nine basic
19 modes of impeachment." Therefore, even juvenile records, misdemeanors, and older criminal
20 records may yield information relevant to many forms of impeachment other than that outlined in
21 NRS 50.095.

22 Prosecutors must also produce criminal history information maintained by law
23 enforcement agencies other than the Las Vegas Metropolitan Police Department, such as the
24 federal government's National Crime Information Center ("NCIC") database.⁴ "[K]nowledge

25 ⁴ Federal law permits disclosure of NCIC information under circumstances such as those
26 here. 28 C.F.R. Chapter 1 addresses the U.S. Dept. of Justice and Criminal Justice Information
27 Systems. 28 C.F.R. Sec. 20.33 sets forth the instances in which NCIC information may be
28 disclosed. It provides for NCIC disclosure "(1) To criminal justice agencies for criminal justice
purposes" 28 C.F.R. Sec. 20.3(g) defines criminal justice agencies as *inter alia* courts.
Additionally, 28 C.F.R. Sec. 20.3 defines the "[a]dministration of criminal justice" to include the

1 [of the NCIC database] may be imputed to the prosecutor, or a duty to search may be imposed, in
2 cases where a search for readily available background information is routinely performed, such
3 as routine criminal background checks of witnesses.” Odle v. Calderon, 65 F. Supp. 2d 1065,
4 1072 (N.D. Cal. 1999), rev’d on other grounds by Odle v. Woodford, 238 F.3d 1084 (9th Cir.
5 2001). A prosecutor’s lack of knowledge regarding a witness’s criminal history does not relieve
6 the prosecutorial obligation to obtain and produce that information. Martinez v. Wainwright,
7 621 F.2d 184, 187-89 (5th Cir. 1980) (defendant entitled to criminal records of state-government
8 witnesses, including data obtainable from the FBI; prosecutor’s lack of awareness of alleged
9 victim’s criminal history did not excuse duty to obtain and produce rap sheet).

10 Requiring prosecutors to run background checks on their witnesses is not a novel
11 proposition. See U.S. v. Perdomo, 929 F.2d 967 (3d Cir. 1991) (adopting 5th Circuit’s rationale
12 in requiring government to obtain complete criminal history on prosecution witnesses). It is the
13 prosecutor’s “obligation to make a thorough inquiry of all enforcement agencies that had a
14 potential connection with the witnesses” U.S. v. Thornton, 1 F.3d 149 (3d Cir. 1993). If the
15 witness has no criminal history, the prosecutor is not required to produce the NCIC printout, as it
16 need not disclose a lack of criminal history. U.S. v. Blood, 435 F.3d 612, 627 (6th Cir. 2006).
17 Thus, prosecutors must run a thorough background check on every witness they intend to call,
18 and produce all criminal history information to the defense.

19 *3. Impeachment information includes evidence contradicting a government witness’s*
20 *statement*

21 Impeachment evidence encompasses prior inconsistent statements and other evidence that
22 contradicts government witnesses. Accordingly, prosecutors must disclose prior inconsistent
23 statements by prosecution witnesses. Lay v. State, 116 Nev. 1185, 1199 (2000). Prosecutors
24 must also disclose other evidence contradicting the testimony of government witnesses. Rudin v.
25 State, 120 Nev. 121, 139 (2004).

26 “performance of any of the following activities . . . adjudication” Therefore, the C.F.R.
27 authorizes prosecutors to access and disclose NCIC data pursuant to Court order as part of a
28 criminal case adjudication.

1 4. Confidential records must be disclosed if they contain impeachment information

2 Impeachment evidence can derive from privileged or confidential material. When this
3 occurs, the privileged or confidential nature of the material at issue must yield to a defendant's
4 constitutionally secured right to confront and cross-examine those who testify against him.
5 Davis, 415 U.S. at 356 (finding the State's interest in maintaining confidentiality of juvenile
6 records must yield to defendant's right to cross-examine as to bias); see also U.S. v. Nixon, 418
7 U.S. 683, 713 (1974) (generalized assertion of privilege must yield to demonstrated, specific
8 need for evidence in a pending criminal case). Thus, prosecutors must obtain and disclose
9 privileged and confidential records when the records contain information bearing on witness
10 credibility.⁵

11 This includes mental health records. U.S. v. Lindstrom, 698 F.2d 1154, 1166-67 (11th
12 Cir. 1983); U.S. v. Robinson, 583 F.3d 1265, 1271-74 (10th Cir. 2009); Wyman v. State, 125
13 Nev. 592, 607-08 (2009). It also includes Child Protective Services (or the functional
14 equivalent) and school records. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (defendant
15 entitled to *in camera* review of Child and Youth Services records⁶); and State v. Cardall, 982
16 P.3d 79, 86 (Utah 1999) (defendant entitled to complainant's school psychological records
17 indicating she had propensity to lie and had fabricated prior rape allegations). It further includes
18 adult and juvenile parole, probation, jail, and prison records. U.S. v. Strifler, 851 F.2d 1197,
19 1201 (9th Cir. 1988); Carriger v. Stewart, 132 F.3d 463, 479-82 (9th Cir. 1997) (requiring
20 production of Department of Corrections file on principle government witness); Davis, 415 U.S.
21 at 356; see also Bennett, 119 Nev. at 603 (2003) (failure to disclose co-conspirator's juvenile
22 records in penalty hearing amounted to Brady violation). Thus, prosecutors cannot refuse

23
24 ⁵ At a minimum, otherwise confidential or privileged material must be submitted to the
25 Court for an *in camera* review to determine materiality. Pennsylvania v. Ritchie, 480 U.S. 39, 60
(1987).

26 ⁶ The Ritchie Court held that the State cannot claim privilege to refuse disclosure of CPS
27 records, unless there is a statutory scheme that forbids any use, including disclosure to a
28 prosecutor, of such records. Ritchie, 480 U.S. at 57-58. NRS 432B.290 allows for disclosure of
such records to the prosecutor and to the court for *in camera* review.

1 disclosure of impeachment information on the basis that the information is privileged or
2 confidential.

3 *5. Impeachment Information Includes Prior Allegations of Sexual Misconduct and Prior*
4 *Sexual Knowledge*

5 Under Nevada law, prior false allegations of sexual misconduct amount to an exception
6 to rape shield laws. Miller v. State 105 Nev. 497 (1989). Accordingly, Nevada law authorizes
7 disclosure of prior false allegations, including those made by juvenile complainants. NRS
8 432B.290(3) specifically authorizes child welfare agencies to disclose “the identity of a person
9 who makes a report or otherwise initiates an investigation . . . if a court, after reviewing the
10 record *in camera* and determining that there is reason to believe that the person knowingly made
11 a false report, orders the disclosure.” Similarly, the Ninth Circuit recognizes it is error to
12 exclude evidence of minor’s prior false sexual assault allegations as this evidence “might
13 reasonably have influenced the jury’s assessment of [the complainant’s] reliability or credibility .
14 . . .” Fowler v. Sacramento Co. Sheriff’s Dept., 421 F.3d 1027, 1032-33; 1040 (9th Cir. 2005).

15 Impeachment evidence in sexual misconduct cases further includes evidence of a
16 complainant’s prior sexual conduct to show sexual knowledge. Summitt v. State, 101 Nev. 159
17 (1985); see also Holley v. Yarborough, 568 F.3d 1091, 1099-1100 (9th Cir. 2009) (finding it was
18 error to exclude evidence that complainant made comments to friends regarding a prior sexual
19 encounter and claimed other boys expressed a desire to engage in sexual acts with her, as this
20 evidence revealed complainant’s active sexual imagination, and may have altered jury’s
21 perception of the complainant’s credibility and reliability of her claims). Thus, prosecutors must
22 disclose evidence of a complainant’s prior accusations of sexual misconduct as well as evidence
23 of a complainant’s prior sexual conduct in cases where such evidence bears on the charged
24 crimes.

25 *6. Law enforcement personnel files may contain impeachment information*

26 Under U.S. v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991), prosecutors must examine law
27 enforcement personnel files upon defense request. See also U.S. v. Cadet, 727 F.2d 1453 (9th
28

1 Cir. 1984). A defendant is not required to make an initial showing of materiality before
2 prosecutors must examine the files—the examination obligation arises solely from the
3 defendant’s request. Henthorn, 931 F.2d at 31. “Absent such an examination, [the State] cannot
4 ordinarily determine whether it is obligated to turn over the files.” Id. Once examined,
5 prosecutors must “disclose information favorable to the defense that meets the appropriate
6 standard of materiality If the prosecution is uncertain about the materiality of the
7 information within its possession, it may submit the information to the trial court for an in
8 camera inspection and evaluation” Henthorn, 931 F.2d at 30-31 (quoting Cadet, 727 F.2d at
9 1467-68). Thus, if requested to do so by the defense, the prosecution must canvass relevant law
10 enforcement personnel files for information material to the case.

11 C. Favorable Evidence Includes Witnesses with Exculpatory Information

12 Prosecutors must disclose the identity of witnesses possessing exculpatory information,
13 as no legitimate interest is served by precluding the defense from calling such witnesses for trial.
14 U.S. v. Eley, 335 F.Supp. 353 (N.D. Ga. 1972); U.S. v. Houston, 339 F.Supp. 762 (N.D. GA
15 1972).

16 D. Favorable Evidence Includes Evidence of Third-Party Guilt

17 The U.S. Constitution guarantees a criminal defendant the right to present evidence of
18 third-party guilt. See Holmes v. South Carolina, 547 U.S. 319 (2006) (holding that refusal to
19 allow defendant to present evidence of third party guilt deprives him of a meaningful right to
20 present a complete defense under the Sixth and Fourteenth Amendments to the U.S.
21 Constitution). Under Brady, prosecutors must disclose all evidence suggesting another
22 perpetrator committed the charged crimes. Lay, 116 Nev. at 1195-96. This includes evidence
23 that another individual was arrested in connection with the charged crime. Banks v. Reynolds,
24 54 F.3d 1508, 1518 n.21 (10th Cir. 1995). It also includes evidence of investigative leads
25 pointing to other suspects. Jimenez, 112 Nev. at 622-23 (withholding evidence of investigative
26 leads to other suspects, regardless of admissibility, constitutes Brady violation).

1 Additionally, prosecutors must provide the actual documents, evidence, and reports
2 pertaining to evidence of third-party guilt; it is not enough for prosecutors to provide the defense
3 with a summary of the information relating to other suspects. Mazzan, 116 Nev. at 69 (summary
4 of prosecutor's perspective on written reports relating to potential suspects were constitutionally
5 inadequate; actual reports should have been disclosed pursuant to Brady); Bloodworth v. State,
6 512 A.2d 1056, 1059-60 (Md. 1986). Thus, prosecutors must disclose any information or
7 evidence indicating someone other than the instant defendant committed the charged crimes.

8 E. Favorable Evidence Includes All Evidence that May Mitigate a Defendant's Sentence

9 Favorable evidence also includes evidence which could serve to mitigate a defendant's
10 sentence upon conviction. Jimenez, 112 Nev. 610. Accordingly, prosecutors must disclose any
11 evidence tending to mitigate punishment in the instant matter.

12 **III. The Disclosure Obligations Conferred by NRS 174.235 and Brady Include Rough**
13 **Notes**

14 Raw notes made by any law enforcement officer or other prosecution agent in connection
15 with the investigation of instant matter must be disclosed to the defense. See, e.g., State v.
16 Banks, 2014 WL 7004489 (Nev. S.Ct. Dec. 10, 2014) (unpublished) (court did not take issue
17 with lower court's order requiring preservation and disclosure of police officer's rough notes);
18 see also U.S. v. Clark, 385 F.3d 609, 619 (6th Cir. 2004) (finding rough notes discoverable under
19 F.R.C.P. 16); U.S. v. Molina-Guevara, 96 F.3d 698, 705 (3d Cir. 1996) (remanding on other
20 grounds but noting that, on remand, production of rough notes required under F.R.C.P. 16); U.S.
21 v. Harris, 543 F.2d 1247 (9th Cir. 1976) (noting as important, and requiring preservation of, law
22 enforcement rough notes). Notably, this does not include information amounting to work
23 product.

24 In Hickman v. Taylor, 329 U.S. 495, 508-11 (1947), the U.S. Supreme Court recognized
25 the privileged nature of discussions relating to the preparation of a case for trial.⁷ The work

26 ⁷ "In performing his various duties, however, it is essential that a lawyer work with a
27 certain degree of privacy, free from unnecessary intrusion by opposing parties and their
28 counsel... Proper preparation of a client's case demands that he assemble information, sift what
 he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his

1 product doctrine announced in Hickman shelters not only material generated by an attorney in
2 preparation for trial, but by his agent, as well:

3 At its core, the work product doctrine shelters the mental processes of the attorney,
4 providing a privileged area within which he can analyze and prepare his client's
5 case. But the doctrine is an intensely practical one, grounded in the realities of
6 litigation in our adversary system. One of those realities is that attorneys often
7 must rely on the assistance of investigators and other agents in preparation for trial.
8 It is therefore necessary that the doctrine protect material prepared by agents for the
9 attorney as well as those prepared by the attorney himself. Moreover, the concerns
10 reflected in the work-product doctrine do not disappear once trial has begun

11 U.S. v. Nobles, 422 U.S. 225, 238-39 (1975). Codifying this, NRS 174.235(2) exempts from
12 discovery:

- 13 1. An internal report, document or memorandum that is prepared by or on behalf
14 of the prosecuting attorney in connection with the investigation or prosecution
15 of the case.
- 16 2. A statement, report, book, paper, document, tangible object or any other type of
17 item or information that is privileged or protected from disclosure or inspection
18 pursuant to the constitution or laws of this state or the Constitution of the United
19 States.

20 Accordingly, only raw notes generated by, or on behalf of, the prosecutor are exempted
21 from disclosure under the work product doctrine. Any other raw notes compiled during the
22 investigation of this matter must be turned over pursuant to the disclosure obligations imposed
23 by NRS 174.235 and Brady.

24 **IV. The Disclosure Obligations Set Forth Above Extend to All Material in the** 25 **Prosecutors Actual or Constructive Possession**

26 Prosecutors must turn over all material related to the case in the possession, control and
27 custody of any government agent or agency. See U.S. v. Blanco, 392 F.3d 382, 388 (9th Cir.

28 strategy without undue and needless interference... This work is reflected, of course, in
interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs,
and countless other tangible and intangible ways – aptly... termed... as the ‘work product of the
lawyer.’ Were such materials open to opposing counsel on mere demand, much of what is now
put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate,
would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in
the giving of legal advice and in the preparation of cases for trial. The effect on the legal
profession would be demoralizing. And the interests of clients and the cause of justice would be
poorly served.” Id.

1 2004). Prosecutors are responsible for disclosing evidence in their possession as well as
2 evidence held or maintained by other government agents, as “it is appropriate to charge the State
3 with constructive knowledge” of evidence held by any investigating agency. Bennett, 119 Nev.
4 at 603.

5 This constructive possession rule applies to evidence that is *withheld* by other agencies.
6 Bennett, 119 Nev. at 603. Even if investigating officers withhold reports without the
7 prosecutor’s knowledge, “the state attorney is *charged with constructive knowledge and*
8 *possession of evidence withheld by other state agents*, such as law enforcement officers.” Id.
9 (internal quotations and citation omitted) (emphasis added). “Exculpatory evidence cannot be
10 kept out of the hands of the defense just because the prosecutor does not have it, where an
11 investigative agency does.” U.S. v. Zuno-Arce, 44 F.3d 1420, 1427 (9th Cir. 1995). “It is a
12 violation of due process for the prosecutor to withhold exculpatory evidence, and his motive for
13 doing so is immaterial.” Jimenez, 112 Nev. at 618.

14 In fact, a prosecutor has an *affirmative obligation* to obtain Brady material and provide it
15 to the defense, *even if the prosecutor is initially unaware of its existence*. “The prosecution’s
16 affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th
17 century strictures against misrepresentation and is of course most prominently associated with
18 this Court’s decision in Brady” Kyles, 514 U.S. at 432. This obligation exists even where
19 the defense does not make a request for such evidence. Id. As the U.S. Supreme Court
20 explained:

21 This in turn means that the individual prosecutor *has a duty to learn* of any
22 favorable evidence known to the others acting on the government’s behalf in the
23 case, including the police. But whether the prosecutor succeeds or fails in meeting
24 this obligation (whether, that is, a failure to disclose is in good faith or bad faith),
25 the prosecution’s responsibility for failing to disclose known, favorable evidence
26 rising to a material level of importance is inescapable. . . . Since then, the
27 prosecutor has the means to discharge the government’s Brady responsibility if he
28 will, any argument for excusing a prosecutor from disclosing what he does not
happen to know about boils down to a plea to substitute the police for the
prosecutor, and even for the courts themselves, as the final arbiters of the
government’s obligation to ensure fair trials.

1 Kyles, 514 U.S. at 437-38 (emphasis added) (citations and footnotes omitted); see also Carriger,
2 132 F.3d at 479-82 (holding that “the prosecution has a duty to learn of any exculpatory evidence
3 known to others acting on the government’s behalf. *Because the prosecution is in a unique*
4 *position to obtain information known to other agents of the government, it may not be excused*
5 *from disclosing what it does not know but could have learned.*” (citations omitted) (emphasis
6 added). Thus, the disclosure obligations outlined above extend not only to material directly in
7 the possession of prosecutors, but material prosecutors constructively possess, as well.

8 **V. An “Open File” Policy Does Not Obviate the Disclosure Obligations Outlined Above**

9 Historically, the Clark County District Attorney’s Office (CCDA) has employed an open
10 file policy in which prosecutors allow defense counsel to review the discovery contained in the
11 government’s trial file. While the CCDA currently may not be adhering to this practice, it is
12 worth noting that an open file policy does not vitiate above-referenced disclosure obligations.
13 Strickler, 527 U.S. at 283 (holding that a prosecutor’s open file policy does not in any way
14 substitute for or diminish the State’s obligation to turn over Brady material). “If a prosecutor
15 asserts that he complies with Brady through an open file policy, defense counsel may reasonably
16 rely on that file to contain all materials the State is constitutionally obligated to disclose under
17 Brady.” Strickler, 527 U.S. at 283, n.23.; see also Amando v. Gonzalez, 758 F.3d 1119, 1136
18 (9th Cir. 2014); McKee v. State, 112 Nev. 642, 644 (1996) (reversing a judgment of conviction
19 based on prosecutorial misconduct where the prosecutor did not make available all relevant
20 inculpatory and exculpatory evidence consistent with the county district attorney’s open file
21 policy); see also Furbay v. State, 116 Nev. 481 (2000) (discussing prosecution’s duty to provide
22 all evidence in its possession where it has promised to do so). Accordingly, if the defense relies
23 on the government’s assurance of an open file policy, the defense is not required to hunt down
24 information otherwise obtained and maintained pursuant to that policy.

25 ///

26 ///

27 ///

1 **VI. Adjudication of the Instant Motion is Necessary for Preservation of Issues Relating**
2 **to Discovery Disclosures**

3 NRS 174.235 requires disclosure of (1) written and recorded statements of a defendant or
4 any witness the prosecutor intends to call in his case-in-chief; (2) results and reports of any
5 examinations or tests conducted in connection with the case at bar; and (3) any document or
6 tangible object the prosecutor intends to introduce in his case in chief—upon the request of the
7 defense. Additionally, constitutional jurisprudence requires disclosure of any evidence tending
8 to exculpate the accused. The instant Motion is brought, *inter alia*, to ensure the availability of
9 appropriate sanctions should later discovery issues arise. This requires a Court Order compelling
10 the production of the information and material sought herein. Donovan v. State, 94 Nev. 671
(Nev. 1978).

11 A. Nevada Law Provides for Judicial Oversight of the State's Discovery Obligations

12 Eighth Judicial District Court Rule (EDCR) 3.24 governs discovery motions in local
13 criminal practice. It states:

14 (a) Any defendant seeking a court order for discovery pursuant to the provisions of
15 NRS 174.235 or NRS 174.245 may make an oral motion for discovery at the
16 time of initial arraignment. The relief granted for all oral motions for discovery
will be as follows:

- 17 (1) That the State of Nevada furnish copies of all written or recorded
18 statements or confessions made by the defendant which are within the
19 possession, custody or control of the State, the existence of which is
known or by the exercise of due diligence may become known to the
district attorney.
- 20 (2) That the State of Nevada furnish copies of all results or reports of
21 physical or mental examinations, and of scientific tests or experiments
22 made in connection with this case which are within the possession,
23 custody or control of the State, the existence of which is known or by
the exercise of due diligence may become known to the district
attorney.
- 24 (3) That the State of Nevada permit the defense to inspect and copy or
25 photograph books, papers, documents, tangible objects, buildings,
26 places, or copies or portions thereof, which are within the possession,
27 custody or control of the State, provided that the said items are material
28 to the preparation of the defendant's case at trial and constitute a
reasonable request.

1 (b) Pursuant to NRS 174.255, the court may condition a discovery order upon a
2 requirement that the defendant permit the State to inspect and copy or
3 photograph scientific or medical reports, books, papers, documents, tangible
4 objects, or copies or portions thereof, which the defendant intends to produce at
the trial and which are within the defendant's possession, custody or control
provided the said items are material to the preparation of the State's case at trial
and constitute a reasonable request.

5 Thus, EDCR 3.24 specifically provides for the discovery motion brought in the instant matter.

6 Not surprisingly, the Nevada Supreme Court has held that a discovery motion and
7 corresponding order is a prerequisite to obtaining relief under NRS 174.295⁸ for later discovery
8 violations:

9 Although NRS 174.295 provides relief for a prosecutor's failure to notify defense
10 counsel of all discoverable material, that statute is only operative in situations
11 where a previous defense motion has been made and a court order issued. That
12 provision is not applicable to any informal arrangements that are made, as here
between counsel without benefit of court sanction.

13 Donovan, 94 Nev. 671 (internal citations omitted).

14 This comports with other portions of NRS 174, which, by implication, suggests criminal
15 discovery is a matter that must be pursued by way of motion rather than a simple written or oral
16 request. For example, NRS 174.285 states that "a request made pursuant to NRS 174.235 or
17 174.245 may be made only within 30 days after arraignment or at such reasonable time *as the*
18 *court may permit*. A party shall comply with a request made pursuant to NRS 174.235 or
19 174.245 not less than 30 days before trial or at such reasonable later time *as the court may*
20 *permit*." (Emphasis added). The judicial permission required for late discovery requests and late
21 compliance contemplates judicial oversight of discovery matters.

22 Similarly, NRS 174.125 contemplates discovery requests via written motion. NRS
23 174.125 requires that, any motion "which by [its] nature, if granted, delay[s] or postpone[s] the
24 time of trial must be made before trial, unless an opportunity to make such a motion before trial
25 did not exist or the moving party was not aware of the grounds for the motion before trial." A
26 discovery request, depending on the timing and nature of the request, may necessarily cause a

27 ⁸ NRS 174.295 sets forth sanctions for discovery violations, such as inspection of
28 material not properly disclosed, trial continuance, or exclusion of the undisclosed material.

1 trial delay. Accordingly, under NRS 174.125, discovery requests should be made via motion
2 prior to trial. Id.

3 Thus, the statutorily-based discovery requests set forth herein are properly brought before
4 this Honorable Court and must be adjudicated. Refusal to adjudicate the instant Motion obviates
5 Mr. McDonald’s statutorily created liberty interest in (1) ensuring access to the discoverable
6 material covered by NRS 174 and (2) ensuring application of the enforcement and sanction
7 provisions outlined in NRS 174. Such an arbitrary deprivation of a state-created liberty interest
8 violates the Due Process Clause. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (arbitrary
9 deprivation of state-created liberty interest amounts to Due Process violation).

10 B. Brady Material and Relevant Authority

11 Brady and related authority also contemplate pre-trial regulation and adjudication of
12 prosecutorial disclosures. Brady is not a discovery rule but a rule of fairness and minimum
13 prosecutorial obligation. Curry v. U.S., 658 A.2d 193, 197 (D.C. 1995) (internal quotations and
14 citations omitted). It does not require the production of specific documents. It requires the
15 production of information. This prosecutorial obligation is non delegable—it is not contingent
16 on, nor is the defense required to make, specific Brady requests. See Strickler, 527 U.S. at 281-
17 82 (setting forth the elements of a Brady claim and clarifying that there is no requirement that
18 defense make request).⁹

19 However, to prevail on a Brady claim, should one arise, a defendant must establish that
20 (1) the prosecution was in actual or constructive possession of favorable information; (2) the
21 prosecution failed to disclose this information to the defense in a timely fashion or at all; and (3)
22 the withheld information was material to the outcome of the trial. Strickler, 527 U.S. at 281-82.
23 The standard for determining materiality depends upon whether defense counsel requested the

24 ⁹ Any argument by prosecutors that “the defense is able to independently seek out any
25 discovery which they desire . . . it is not the State’s responsibility to perform investigations or
26 inquiries on behalf of the defense,”—common responses to defense discovery motions—is
27 patently wrong. Strickler, 527 U.S. at 281-82 (rejecting the argument that defense counsel
28 should have uncovered Brady information); Banks v. Dretke, 540 U.S. 668, 695-98 (2004) (“A
rule thus declaring ‘prosecutor may hide, defendant must seek’ is not tenable in a system
constitutionally bound to accord defendants due process.”).

1 information at issue and, if a request was made, whether the request was specific or general in
2 nature. “If a defendant makes no request or only a general request for information, the evidence
3 is material when a reasonable *probability* exists that the result would have been different had it
4 been disclosed.” Bennett, 119 Nev. at 600 (emphasis added). Yet, “if the defense request is
5 specific, the evidence is material upon the lesser showing that a reasonable *possibility* exists of a
6 different result had there been disclosure.” Id. (emphasis added) Accordingly, the fact and
7 nature of a Brady request is critical to later adjudication of alleged Brady violations.

8 Defense counsel enjoys to the right to pursue Brady requests—and thereby construct the
9 record on them—in the manner counsel sees fit. The best way to ensure that the record
10 adequately reflects the nature and scope of a Brady request is via pre-trial discovery motion—a
11 motion, as set forth above, specifically provided for by Nevada law.¹⁰ See Myles v. State, 127
12 Nev. 1161 (2011) (unpublished) (no discovery violation where undisclosed photo not requested
13 as part of discovery motion).

14 A cursory review of federal discovery jurisprudence reveals the broad authority with
15 which trial courts are vested to regulate pretrial Brady disclosures and thereby ensure that this
16 constitutional rule—which exists to prevent a miscarriage of justice—works as it should.
17 Bagley, 473 U.S. at 675; U.S. v. Odom, 930 A.2d 157, 158 (D.C. 2007); see also U.S. v. W.R.
18 Grace, 526 F.3d 499, 509 (9th Cir. 2008) (affirming trial court’s order requiring government to
19 disclose its finalized witness list a year prior to trial as an exercise of the court’s inherent
20 authority to manage its docket”); U.S. v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001)
21 (acknowledging trial court’s discretion to order pretrial disclosures as a matter of sound case
22 management); U.S. v. Rigas, 779 F. Supp. 408, 414 (M.D. Pa. 2011 (recognizing authority of
23 trial court to order pretrial disclosure of Brady material to ensure effective administration of
24 criminal justice system); U.S. v. Cerna, 633 F. Supp. 2d 1053, 1057 (N.D. Cal. 2009) (exercising
25 power to issue Brady order); U.S. v. Thomas, 2006 WL 3095956 (D.N.J. 2006) (issuing pretrial
26 order regulating, *inter alia*, Brady disclosures).

27 ¹⁰ This is especially true given the absence of compelling Nevada or other authority
28 recognizing an informal Brady request as sufficient to preserve the record on this critical issue.

1 Indeed, trial courts must, as a constitutional matter, exercise this oversight power. Boyd
2 v. U.S., 908 A.2d 39, 61 (D.C. 2006) (“courts have the obligation to assure that [prosecutorial
3 discretion] is exercised in a manner consistent with the right of the accused to a fair trial”); see
4 also Smith v. U.S., 665 A.2d 962 (D.C. 2008) (abuse of discretion for court to refuse to review a
5 transcript *in camera* where prosecution concede there were “minor inconsistencies in the
6 testimony as to how the shooting happened”). As such, judicial oversight of Brady disclosures is
7 commonplace in federal criminal prosecutions. See, e.g., U.S. v. Johnson, 2010 WL 322143
8 (W.D. Pa. 2010) (trial court ordering government to disclose all Brady material, including
9 impeachment material no later than ten days prior to trial); U.S. v. Lekhtman 2009 WL 5095379
10 at 1 (E.D.N.Y. 2009) (ordering disclosure of Brady material as it is discovered and Giglio
11 material two weeks before commencement of trial); U.S. v. Rodriguez, 2009 WL 2569116 at 12
12 S.D.N.Y. 2009) (ordering government to turn over Brady material as it is discovered and Giglio
13 material twenty-one days before trial); U.S. v. Libby, 432 F. Supp. 2d 81, 86-87 (D.D.C. 2006)
14 (ordering immediate production of all Brady material); U.S. v. Thomas, 2006 CR 553, 2006 WL
15 3095956 (D.N.J. 2006) (unpublished) (ordering disclosure of “[a]ny material evidence favorable
16 to the defense related to issues of guilt, lack of guilt, or punishment . . . within the purview of
17 Brady and its progeny” within ten days of order). Thus, the constitutionally-based Brady
18 requests set forth herein are properly brought before this Honorable Court and must be
19 adjudicated to preserve Mr. McDonald’s rights.

20 **VII. The Court Must Adjudicate the Instant Motion Regardless of Whether a Discovery** 21 **Dispute Exists**

22 A dispute over the discoverability of certain material is not a prerequisite to compelling
23 production of discovery and exculpatory information. This is because such disputes rarely occur.
24 With the exception of records that are otherwise privileged (such as CPS or medical records),
25 prosecutors typically do not inform defense counsel of material they intend to withhold from the
26 defense. They simply keep the information hidden. The withheld information is later discovered
27
28

1 by the defense either through subsequent defense investigation, fortuitous circumstances, or
2 during the post-conviction discovery process.

3 Recognizing this, the U.S. Supreme Court has not required defense counsel to divine (and
4 bring to the Court's attention) particular information within the government's file that is being
5 shielded from defense view:

6 We rejected a similar argument in Strickler. There, the State contended that
7 examination of a witness's trial testimony, alongside a letter the witness published
8 in a local newspaper, should have alerted the petitioner to the existence of
9 undisclosed interviews of the witness by the police. We found this contention
10 insubstantial. In light of the State's open file policy, we noted, 'it is especially
11 unlikely that counsel would have suspected that additional impeaching evidence
was being withheld. Our decisions lend no support to the notion that defendants
must scavenge for hints of undisclosed Brady material when the prosecution
represents that all such material has been disclosed. As we observed in Strickler,
defense counsel has no 'procedural obligation to assert constitutional error on the
basis of mere suspicion that some prosecutorial misstep may have occurred.

12 Banks, 540 U.S. at 695-96 (internal citations omitted). Thus, a dispute need not exist over the
13 discoverability of a particular piece of information in order for this Court to entertain motions
14 such as that brought here and enforce the government's discovery obligations. Accordingly, Mr.
15 McDonald respectfully requests that this Honorable Court adjudicate his Motion to Compel
16 Production of Discovery.

17 **VIII. Prosecutors Must Oppose or Concede Each Discovery Request; and the Court Must**
18 **Adjudicate Each Request**

19 Prosecutors often respond to discovery requests some combination of the following: (1) the
20 government is aware of its discovery obligation and will act accordingly; (2) the government has
21 complied with the requests or will facilitate review of discovery as needed; or (3) the request is
22 objectionable as overbroad, immaterial, or not authorized by law. Only the last of these is
23 responsive to a particular request; the first two are not. Each request needs to be opposed or
24 conceded. Saying "we have complied" or "we are aware of our discovery obligations" or "we
25 will facilitate a review of detective notebooks" is nothing more than attempt to subvert a ruling
26 enforcing the discovery provisions mandated by state and federal law. It is a way to goad the
27 court into believing the issue is moot. Discovery is a continuing obligation. A criminal
28

1 defendant is entitled to an order enforcing the discovery provisions outlined by state and federal
2 law, regardless of whether the prosecutor has already provided certain requested material, is
3 aware of pertinent discovery rules, and is willing to facilitate further discovery review. The
4 prosecutor needs to oppose or concede each request. The Court needs to rule on each request,
5 accordingly.¹¹

6 **IX. Defendant's Specific Discovery Requests**

7 Based upon the foregoing, Mr. McDonald requests that this Honorable Court enter an
8 order directing prosecutors to provide the following related to this case:¹²

9 **General Discovery**

10 **1. Defendant's Statements**

11 All statements made by the defendant, regardless of whether the statements were
12 written or recorded, including but not limited to:

- 13 • Comments made at the time of arrest or during transport to the detention center,
- 14 • All conversations, telephonic or otherwise, intercepted by any law enforcement
15 agencies, including federal authorities, and
- 16 • The substance of any statements, conversations, or correspondence overheard or
17 intercepted by any jail personnel or other inmates which have not been recorded
or memorialized.

18 **To date, the Defense has been provided with a transcribed statement taken from Mr.
McDonald on or about January 18, 2018.**

19 **2. Potential Witnesses' Statements**

20 All written or recorded statements of witnesses and potential witnesses, including, but
21 not limited to:

- 22 • Audio and video recording in any form collected by investigating officers or any
23 other law enforcement agent as part of the investigation of this matter, as well as
24 any related matters,

25 ¹¹ Combination responses, which contain conciliatory language in conjunction with some
26 form of opposition, must be treated as an opposition to a particular request, thereby warranting
adjudication by this Honorable Court.

27 ¹² Significantly, this request is not in any way intended to be a substitute for the
28 generalized duties described above.

- Notes of interviews, such as notes of patrol officers, or notes of phone calls made to potential witnesses, or attempts to contact such witnesses, and
- Interviews of the following individuals: Betty Cotton, Portia Bryant, Laura Hicks, S.B., and Donnell Cotton, and any other witness or investigative official involved in the instant matter and any related matter.

The only witness interviews currently provided are from 2017 (S.B.) and 2018 (Defendant). Despite references to interviewing the other family members, it is unclear if anything was ever done. No others have been received.

3. Records Related to Investigation

All records of the Las Vegas Metropolitan Police Department and any other law enforcement agencies involved in the investigation of this or any related matter, including, but not limited to:

- Copies of handwritten or other notes,
- Investigative leads that were not followed up on,
- Any other matter bearing on the credibility of any State witness,
- Information pertaining to this case or any witnesses in this case, no matter what the form or title of the report, including:
 - “Case Monitoring Forms,”
 - 911 recordings,
 - Dispatch logs, and
 - Information regarding leads or tips provided to law enforcement or a crime tip organization such as Crime Stoppers, including any reward or benefit received for such tip.

Presently, the Defense has the Declaration of Warrant/Summons (4/18/2018), Officers Report (12/27/2001), and LVMPD untitled report (2 pages, 12/29/2001). If additional reports containing the summary of any interviews were drafted, the Defendant does not currently have them.

4. Crime Scene Analysis, Evidence Collection, and Forensic Testing

All requests, results, reports, and bench notes pertaining to all crime scene analysis, evidence collection and forensic testing performed in this case,¹³ including, but not limited to:

¹³ This is required under NRS 171.1965(1)(b) and NRS 174.235(1)(b).

- Photographic, video, and audio recordings of evidence collection and testing,
- Fingerprint Evidence: All latent prints recovered in the instant matter, regardless of their value for identification, as well as exemplars compiled in connection with the investigation of this matter, including:
 - photographs, reports, and recordings related to collecting and testing of fingerprints,
 - Results of fingerprint collection and comparison, and
 - Automated Fingerprint Identification System (AFIS) searches and results,
- DNA Evidence: DNA testing, raw data and Combined DNA Index System (CODIS) searches and results,
- Scientific Evidence: toxicological, chemical, biochemical, laboratory, and other laboratory or forensic analyses, including trace evidence analyses, crime scene reconstruction or blood spatter analysis, and
- Forensic Analysis: reports and notes related to any forensic analysis and requests for forensic analysis, regardless of the outcome of such request.
- This request encompasses, but it not limited to, any work done by the following individuals: Acevedo, Bejamin, Dannenberger, Gauthier and any additional personnel involved in this case.

5. Medical Records

All records, including photos, reports, imaging studies, test results, and notes pertaining to:

- S.B., generated pursuant to treatment provided in connection with the instant matter; including, without limitation, all emergency medical hospital, or other medical care provider records, including all relevant prior medical records, and photography/videography associated with the SCAN examination prepared in this case.

The Copy of the Complainant's SCAN examination is illegible in all forms we have received it in (paper and electronic). Currently, it is impossible for Defendant to have the SCAN assessed or potentially hire and expert to review it with photography.

6. Preservation of and Access to Raw Evidence

Access to and preservation of all material collected in the investigation of this case to include but not limited to:

- forensic material, raw data, biological samples and toxicological samples; and
- video surveillance, photographic negatives, and digital negatives.

To date, the Defendant believes he has received all necessary DNA raw data associated with this case. No photo or video evidence has been produced whatsoever.

8. Law Enforcement Video or Audio Recordings

All video and audio recordings obtained by the Las Vegas Metropolitan Police Department recording device, including but not limited to:

- Dashboard cameras,
- Body-mounted officer cameras,
- Any other recording equipment operational during the investigation of this case, and
- Any video footage captured by body cameras worn by any officer associated with this case (if available) – or affirmation that no bodycams were worn given the year of this case.

Defendant has received nothing associated with this category.

13. Witness Contact Information

All updated witness contact information, including last known addresses and phone numbers. This includes the names and contact information for witnesses who may have information tending to exculpate Mr. McDonald.

Contact information (or affirmation that currently contact information is current) associated with the following lay-witnesses: Portia (Porsha) Bryant, Donnel Cotton, Betty Cotton, and Laura Hicks.

18. Witness Benefits

Disclosure of all express or implied compensation, promises of favorable treatment or leniency, or any other benefit that any of the State's witnesses received in exchange for their cooperation with this or any related prosecution. This includes, but is not limited to:

- Records and notes from the CCDA Victim Witness Office, including records of any expectation of any benefit or assistance to be received, or already received by any witness in this case,
- Monetary benefits received as well as any express or implied promises made to any witness to provide counseling, treatment, or immigration assistance as a result of the witness's participation in this case,

- Names of all agencies, workers or other referrals that were given to any witness or his family member, relative, or guardian in connection with this case or any related matter, and
- Estimate of future benefits to be received by any witness during or after the trial, including travel expenses.

19. Prior Witness Statements

Disclosure of any and all statements, tangible or intangible, recorded or unrecorded, made by any witness that are in any manner inconsistent with the written or recorded statements previously provided to the defense. This includes oral statements made to an employee or representative of the CCDA or any other government employee, local or federal, during pre-trial conferences or other investigative meetings.

20. Law Enforcement Impeachment Information—Henthorn Request

Mr. McDonald hereby requests the prosecutor review the personnel files of each officer involved in this case. After review, the prosecutor must disclose all impeachment information located in the personnel files of any police witness called to testify at trial or any pretrial hearing in this matter, including, but not limited to, any Statement of Complaint regarding the witness or this investigation, any Employee Notice of Internal Investigation, any Internal Affairs Investigative Report of Complaint, any witness statement, any Bureau Investigation Supervisory Intervention, and any other document maintained or generated by the Office of Internal Affairs, Critical Incident Review Panel, or other investigative agency.

21. Criminal History Information

Criminal history information on any actual or potential witness, showing specific instances of misconduct, instances from which untruthfulness may be inferred or instances which could lead to the discovery of admissible evidence. To this end, the defense requests that, in addition to any other lay witnesses the State intends to call at trial or upon whose testimony or statements the State will rely during either the trial, the CCDA review NCIC reports on all lay-witnesses disclosed in this case and disclose admissible convictions. The defense further requests that the NCIC

1 information be provided to defense counsel as soon as possible and that prosecutors
2 identify those individuals for whom no NCIC information is found. While the
3 defense is not insisting that prosecutors run NCICs on expert or law enforcement
4 witnesses, the defense requests that the State be ordered to comply with its Brady
5 obligations with respect to these witnesses. The instant criminal history request
6 includes, but is not limited to:

- 7 • Misdemeanors (implicated dishonesty / moral turpitude),
- 8 • Out-of-state arrests and convictions,
- 9 • Outstanding arrest warrants or bench warrants,
- 10 • Cases which were dismissed or not pursued by the prosecuting agency, and
- 11 • Any other information that would go to the issues of credibility or bias, or lead to
12 the discovery of information bearing on credibility or bias, regardless of whether
the information is directly admissible by the rules of evidence.

13 **Presently, the Defense is aware of one felony conviction for the Complainant.**

14 **41. Prior Allegations of Sexual Misconduct**

15 All information known, or which could be known by diligent action (i.e. affirmatively
16 asking the Complainant), of any previous allegations of sexual misconduct or
17 physical abuse made by the alleged victim or any material witness in the case.

18 **42. Sources of Sexual Knowledge**

19 All information known or obtainable through the exercise of due diligence indicating
20 that S.B., at the time of the disclosure, may have had sources of sexual knowledge
21 outside the events at issue here.

22 **IX. Request for Timely Disclosure**

23 NRS 174.285(1) requires that any discovery request pursuant to NRS 174.235 be made
24 “within 30 days after arraignment or at such reasonable later time as the court may permit.”
25 NRS 174.285(2) mandates that “A party shall comply with a request made pursuant to NRS
26 174.235 . . . not less than 30 days before trial or at such reasonable later time as the court may
27 permit.” Accordingly, Mr. McDonald requests that this Honorable Court enter an order directing
28

1 prosecutors to provide the discovery sought herein within a reasonable time in advance of trial so
2 as to enable counsel to effectively prepare. Further, Mr. McDonald requests that this Honorable
3 Court order that prosecutors be precluded from admitting at trial any discovery or evidence not
4 timely produced. See NRS 174.295 (“If at any time during the course of the proceedings it is
5 brought to the attention of the court that a party has failed to comply with the provisions of NRS
6 174.235 to 174.295, inclusive, the court may order the party to permit the discovery or inspection
7 of materials not previously disclosed, grant a continuance, or *prohibit the party from introducing*
8 *in evidence the material not disclosed*, or it may enter such other order as it deems just under the
9 circumstances.”) (emphasis added).

10 CONCLUSION

11 Based on the foregoing, Mr. McDonald, respectfully requests that this Honorable Court
12 grant the instant motion, and order the timely disclosure of the material sought herein. NRS
13 174.235; Brady v. Maryland, 373 U.S. 83 (1963); U.S.C.A. V, VI, XIV; and Nev. Const. Art. 1 §
14 8.

15 DATED this 20th day of November, 2019.

16 PHILIP J. KOHN
17 CLARK COUNTY PUBLIC DEFENDER

18
19 By: /s/Tegan C. Machnich
20 TEGAN C. MACHNICH, #11642
21 Deputy Public Defender
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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the foregoing Motion to Compel Production of Discovery & Brady Material on for hearing before the Court on the 2nd day of December, 2019 at 8:30 a.m. in District Court Department 10.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcounttyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office



DARIN F. IMLAY, PUBLIC DEFENDER
NEVADA BAR NO. 5674
TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Tegan.Machnich@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

SAMUEL MCDONALD,

Defendant,

CASE NO. C-18-334954-1

DEPT. NO. X

DATE: December 2, 2019
TIME: 8:30 a.m.

**MOTION TO STRIKE PROPOSED EXPERTS MICHAEL ZBIEGIEN
AND PEGGY MCCOY**

COMES NOW, the Defendant, SAMUEL MCDONALD, by and through TEGAN MACHNICH, Chief Deputy Public Defender and hereby requests that this Court strike proposed expert witnesses Michael Zbiegien and Peggy McCoy at trial.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 20th day of November, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

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1 **FACTS**

2 Defendant Samuel McDonald is awaiting trial on two counts of Sexual Assault with a
3 Minor under the Age of Fourteen. The State has alleged that Mr. McDonald forced his
4 girlfriend's son, a nine-year old named S.B., to perform fellatio on him and engage in anal
5 intercourse on or about December 27, 2001. S.B. disclosed the alleged sexual abuse in the
6 evening hours of December 27, 2001, at which time his mother brought him to Sunrise Hospital
7 for an exam. Police were contacted by Sunrise Hospital in the early morning hours of December
8 28, 2001.

9 Dr. Michael Zbiegien and Peggy McCoy, RN, were involved in the administration of the
10 SCAN examination.

11 **ARGUMENT**

12 N.R.S. 174.234(2) reads, in relevant part, as follows:

13 "If the defendant will be tried for one or more offenses that are punishable as a gross
14 misdemeanor or felony and a witness that a party intends to call during the case in chief
15 of the State or during the case in chief of the defendant is expected to offer testimony as
16 an expert witness, the party who intends to call that witness shall file and serve upon the
opposing party, not less than 21 days before trial or at such other time as the court directs,
a written notice containing:

- 17 (a) A brief statement regarding the subject matter on which the expert witness is
18 expected to testify and the substance of his testimony;
19 (b) A copy of the curriculum vitae of the expert witness; and
20 (c) A copy of all reports made by or at the direction of the expert witness."

21 It is clear from the statute that the State must provide the defense with what an expert
22 witness is going to testify to, the expert's curriculum vitae, and any and all reports that the expert
23 used to rely on his or her expert opinion.
24

25 In this case, the SCAN report currently in the Defendant's possession is unreadable. The
26 notes made by all administering personnel are largely illegible and large areas of notes are
27 absent. Further, the "video colposcopy" has never been produced. The State has informed
28

1 counsel that medical records have been requested. However, this case is almost two (2) years old
2 and has been continued numerous times.

3 **Dr. Zbiegien:**

4 In this case, it appears that Dr. Zbiegien is not qualified as an expert. Other than his
5 supposedly "current" position, he has apparently never worked in an area of care associated with
6 child sexual assault examinations. He received his "Doctor of Medicine" from American
7 University of the Caribbean. Apparently, it was not until seven years later that he received his
8 Bachelor of Science in Biology degree from a small college in Lisle, Illinois. He has received no
9 specialized or post-graduate training in the requisite area, holds no specific degree specializing in
10 the area of sexual assault exam analysis, has never published or presented on the topic, is not
11 affiliated with any association specializing in the topic and holds no specific certifications.
12 Further, there is no indication that has previously testified in the Eighth Judicial District Court in
13 a criminal case. [See Exhibit A.]
14
15

16 While he is supposedly "presently" the Medical Director of the SCAN Team at Sunrise
17 Children's Hospital, that is belied by the fact that he does not appear to currently be employed by
18 Sunrise. (Google search.) This is all bolstered by the fact that the SCAN report in this case
19 cannot be challenged due to its poor quality.
20

21 Further, Dr. Zbiegien is disclosed in the following manner: "...is a medical doctor and
22 will testify regarding the medical examination and/or SCAN examination conducted on the
23 victim in this case." This generic description does not indicate his area of expertise or how he
24 plans to testify within that area. As such, he should not be allowed to testify to any expert
25 opinions in this case or come to any conclusions. Further, given the state of the medical records
26 and apparent loss of the pictures/videos associated therewith, all testimony concerning the
27 contents thereof must be disallowed.
28

1 **Peggy McCoy, RN:**

2 It is impossible for the Defense to know if Ms. McCoy is qualified, as her CV has never
3 been produced by the State of Nevada. The expert deadline in this case has passed. It is not
4 partially attached, nor is it unreadable. It is absent. Her name is generic enough that she cannot
5 be effectively located in a Nevada nursing licensure search.

6 And, similar to Dr. Zbiegien, she is generically noticed as a "registered nurse and will
7 testify regarding the medical examination and/or SCAN examination conducted on the victim in
8 this case." This generic description does not indicate her area of expertise or how she plans to
9 testify within that area. As such, she should not be allowed to testify to any expert opinions in
10 this case or come to any conclusions. Further, given the state of the medical records and apparent
11 loss of the pictures/videos associated therewith, all testimony concerning the contents thereof
12 must be disallowed.
13
14

15 **CONCLUSION**

16 For the foregoing reasons, the Defense requests that this Court strike witnesses Michael
17 Zbiegien and Peggy McCoy from testifying as experts in this case.

18 DATED this 20th day of November, 2019.

19 **DARIN F. IMLAY**
20 **CLARK COUNTY PUBLIC DEFENDER**

21
22 By: /s/Tegan C. Machnich
23 **TEGAN C. MACHNICH, #11642**
24 **Deputy Public Defender**
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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion to Strike Proposed Experts Michael Zbiegien and Peggy McCoy on for hearing before the Court on the 2nd day of December, 2019, at 9:00 a.m. in District Court Department 10.

DATED this 20th day of November, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Deputy Public Defender

I hereby certify that service of the above and forgoing Motion to Strike Proposed Experts Michael Zbiegien and Peggy McCoy was served via electronic e-filing to the Clark County District Attorney's Office on this 20th day of November, 2019.

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office

EXHIBIT A



NWEW
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JACOB J. VILLANI
Chief Deputy District Attorney
Nevada Bar #011732
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,
Plaintiff,

-vs-

**SAMUEL CRAIG MCDONALD,
#1753770**

Defendant.

CASE NO: C-18-334954-1

DEPT NO: X

STATE'S NOTICE OF WITNESSES AND/OR EXPERT WITNESSES
[NRS 174.234]

TO: SAMUEL CRAIG MCDONALD, Defendant; and

TO: TEGAN MACHNICH, Deputy Public Defender, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief:

ACEVEDO, JESSICA, LVMPD #13770; is a forensic scientist and will testify regarding the forensic DNA testing in this case and the results thereof.

BENJAMIN, JACLYN, MFS, 10430 Furnace Rd., Ste. 107, Lorton, VA; is a DNA Analyst and Forensic Biology Analyst with Bode Cellmark Forensics. She will testify regarding the forensic DNA testing in this case and the results thereof.

BRYANT, PORSHA (aka Portia); c/o CCDA – SVU/VWAC

CHURCHWOOD, H.; c/o Officer of the Inspector General, NV Department of Corrections

COMISKEY, S.; LVMPD #6532

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1 COTTON, DONNEL; c/o CCDA – SVU/VWAC
2 COTTON-BRYANT, BETTY; 315 S. Locust, Compton, CA
3 CUSTODIAN OF RECORDS; CCDC
4 CUSTODIAN OF RECORDS; LVMPD Communications
5 CUSTODIAN OF RECORDS; LVMPD Records
6 DANNENBERGER, KIMBERLY, LVMPD #13772; is a forensic scientist and will
7 testify regarding CODIS and the procedures of the LVMPD forensic lab.
8 DETWEILER, W.; LVMPD #5460
9 GAUTHIER, KELLIE, LVMPD #8691; is the DNA manager for the LVMPD forensic
10 lab and will testify regarding the outsourcing of sexual assault kits, CODIS and the procedures
11 related thereto, and LVMPD's practices and procedures regarding DNA analysis.
12 GONZALEZ, A.; LVMPD #6188
13 HICKS, LAURA; 1700 Alta Dr., #2106, LVN
14 MCCOY, PEGGY, R.N., c/o Sunrise Hospital, 3186 S. Maryland Pkwy., LVN; is a
15 registered nurse and will testify regarding the medical examination and/or SCAN examination
16 conducted on the victim in this case.
17 MCGILL, JODI; CCDA Investigations
18 MORIARTY, S.; LVMPD #6358
19 OETTINGER, W.; LVMPD #4578
20 RICHTER, T.; LVMPD #4374
21 S.B.; c/o CCDA – SVU/VWAC
22 TOOLEY, S.; LVMPD #6224
23 ZACHARIAZ, J.; c/o Officer of the Inspector General, NV Department of Corrections
24 ZBIEGIEN, DR. MICHAEL, M.D., FAAP, c/o Sunrise Hospital, 3186 S. Maryland
25 Pkwy., LVN; is a medical doctor and will testify regarding the medical examination and/or
26 SCAN examination conducted on the victim in this case.
27 ///
28 ///

1 These witnesses are in addition to those witnesses endorsed on the Information or
2 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
3 Witnesses has been filed.

4 The substance of each expert witness's testimony and copy of all reports made by or at
5 the direction of the expert witness have been provided in discovery.

6 A copy of each expert witness's curriculum vitae, if available, is attached hereto.

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

10 BY /s/ Jacob J. Villani
11 JACOB J. VILLANI
12 Chief Deputy District Attorney
13 Nevada Bar #011732

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18 CERTIFICATE OF ELECTRONIC TRANSMISSION

19 I hereby certify that service of the above and foregoing was made this 5th day of
20 February, 2019, by electronic transmission to:

21 TEGAN MACHNICH, Deputy Public Defender
22 Email Address: tegan.machnich@clarkcountynv.gov

23 ANN McMAHAN, Legal Secretary
24 Email Address: mcmahaae@clarkcountynv.gov

25 BY: /s/ J. Georges
26 Secretary for the District Attorney's Office

27
28 jg/SVU

Curriculum Vitae
MICHAEL STEVEN ZBIEGNIEN, M.D.; FAAP

Sunrise Children's Hospital
Department of Emergency Medicine
3186 South Maryland Parkway
Las Vegas, Nevada 89109

CURRENT POSITION

Medical Director; Emergency Services
Attending Physician
Sunrise Children's Hospital
Las Vegas, Nevada
1997 to Present

Medical Director; "Kids Line"
Pediatric Advice Telephone Service
Sunrise Children's Hospital
Las Vegas, Nevada
1997 – Present

Medical Director; SCAN Team
Sunrise Children's Hospital
1997 – Present

PAST POSITIONS

St. John Hospital and Medical Center
Detroit, Michigan
Department of Emergency Medicine – Attending
Physician
Department of Pediatrics – Attending Physician
July 1995 to September 1997

Botsford General Hospital
Farmington Hills, Michigan
Department of Pediatrics – Attending Physician

Children's Hospital of Michigan
Detroit, Michigan
Division of Emergency Medicine – Attending
Physician
July 1993 to June 1995

Children's Hospital of Michigan
Pediatric Urgent Care Center

MICHAEL STEVEN ZBIEGNIEN
Curriculum Vitae
Page -1-

Southfield, Michigan
Attending Physician
1992 to 1995

St. Thomas Hospital
St. Thomas, United States Virgin Islands
Dept. of Emergency Medicine – Attending Physician
August 1986 through May 1988

POST GRADUATE TRAINING

Pediatric Emergency Medicine Fellow
Children's Hospital of Michigan
Detroit Medical Center
Wayne State University School of Medicine
Detroit, Michigan
July 1991 through June 1993

Pediatrics – Cooper Hospital/UMC
Camden, New Jersey
University of Medicine and Dentistry of New Jersey
PGY I through PGY III
July 1988 through June 1991

DEGREES

American University of the Caribbean
Coral Gables, Florida & Montserrat, BWI
Doctor of Medicine, 1986

Illinois, Benedictine College
Lisle, Illinois
Bachelor of Science in Biology 1993

PUBLICATIONS & PRESENTATIONS

Acute Epiglottitis in the Infant: Presentation and Treatment

Zbiegien MS, Schaffer SR, Sweeney RL
Presented in part at the Eastern Section Meeting of
The American Laryngological, Rhinological, and
Osteological Society
February 1991

Morbidity and Mortality of Pediatric Thoracic Trauma

Zbiegien MS, Ross S, Sweeney RL
Presented in part at the National Conference of
Pediatric Trauma
September 1992

MICHAEL STEVEN ZBIEGIEN
Curriculum Vitae
Page -2-

**AWARDS &
HONORS**

Distinguished Teaching Award 1989 % 1990
University of Medicine and Dentistry of New Jersey
Phi Lambda Kappa Medical Honor Society
Tri-Beta National Biology Honor Society

**PREVIOUS
ADMINISTRATIVE
DUTIES**

Emergency Center Quality Assurance Committee –
St. John Hospital
Emergency Center Improvement Council - St. John
Hospital
Physician Paging Continuous Quality Improvement –
St. John Hospital
Emergency Center Admitted Patient Turn-Around
Time Continuous Quality Improvement –
St. John Hospital
Emergency Center Non-Admitted Patients Turn-
Around Time Continuous Quality Improvement
– St. John Hospital
Physicians and the Internet Instructor - St. Johns
Hospital
Physician In Charge – Resident / Attending Physician
Evaluations St. John Hospital
Physician In Charge – Pediatrics Emergency
Medicine Research Projects St. John Hospital
Physician In Charge – Pediatric in House Coverage –
Botsford Hospital

ASSOCIATIONS

American Academy of Pediatrics
American Academy of Pediatrics
Subchapter – Emergency Medicine
American College of Emergency Physicians
American Medical Association
National Medical & Dental Association
Society for Academic Medicine

**ADDITIONAL
QUALIFICATIONS**

Assistant Professor – Pediatrics
University of Nevada School of Medicine

Assistant Professor – Pediatrics
Wayne State University School of Medicine

Assistant Professor – Emergency Medicine
Wayne State University School of Medicine

MICHAEL STEVEN ZBIEGIEN
Curriculum Vitae
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Assistant Clinical Professor - Pediatrics
American Board of Pediatrics

Board Eligible – Pediatrics Emergency Medicine
American Board of Pediatrics
American Board of Emergency Medicine

Basic Life Support Certified
Advanced Cardiac Life Support Certified
Pediatric Advanced Life Support Instructor – Certified
Neonatal Advanced Life Support – Certified
Michigan Medical License # 4301058091
US Virgin Islands Federal Medical License #928
Nevada Medical License # 8319
Fluency in the Polish Language
Computer Literate

MICHAEL STEVEN ZBIEGIEN
Curriculum Vitae
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DARIN F. IMLAY, PUBLIC DEFENDER
NEVADA BAR NO. 5674
TEGAN C. MACHNICH, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11642
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Tegan.Machnich@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

SAMUEL MCDONALD,

Defendant,

CASE NO. C-18-334954-1
DEPT. NO. X

DATE: December 2, 2019
TIME: 8:30 a.m.

MOTION TO DISMISS

COMES NOW, the Defendant, SAMUEL MCDONALD, by and through TEGAN C. MACHNICH, Chief Deputy Public Defender and respectfully moves this court to dismiss the charges for violation of the defendant's Fifth Amendment right to due process under the law.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 20th day of November, 2019.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/Tegan C. Machnich
TEGAN C. MACHNICH, #11642
Chief Deputy Public Defender

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1 test back-logged sexual assault kits. How the DNA in this case got classified as “cold case” with
2 perpetrator unknown is anyone’s guess.

3 In August 18, 2005, North Las Vegas Police responded to Sunrise Hospital reference
4 allegations of sexual assault of several minor children. The mother of the children, Tuwanna
5 Smith, reported that her children had disclosed sexual contact with her then-boyfriend, Mr.
6 McDonald. NLVPD ran Mr. McDonald, identified that he was a registered sex offender, and
7 went to the address where he was registered. He was immediately located, arrested and charged.

8 Ultimately, Mr. McDonald entered a guilty plea agreement on December 15, 2005. He
9 was sentenced on January 31, 2006 to life in the Nevada Department of Corrections, with the
10 possibility of parole after twelve (12) years. No mention was made of the 2001 allegations or
11 case, and it was not packaged pursuant as part of the negotiations. Mr. McDonald has remained
12 in the NDOC since that time.

13 The Clark County Grand Jury returned an Indictment on this case on or about September
14 18, 2018. Notably, the State presented only one witness before the grand jury – the Complainant.
15 The testimony of S.B., who had not seen or heard from his alleged assailant for 17 years, was the
16 sole basis of the Indictment. He provided the factual basis for the claim and the only
17 identification of Mr. McDonald. Notably, in the Return to Mr. McDonald’s Petition for Writ of
18 Habeas Corpus, the State noted that the “burden of showing probable cause was met...when S.B.
19 testified regarding the acts Defendant subjected him to as a nine-year-old boy.” See State’s
20 Return to Writ of Habeas Corpus. Ultimately this Honorable Court denied Mr. McDonald’s
21 Writ, holding that the “State presented sufficient evidence to establish probable cause at the
22 grand jury proceeding.” See Decision Minutes dated November 16, 2018.

23 Because the exact same probable cause existed (albeit in a fresh, more timely form) in
24 2001 and the State knew exactly who the alleged perpetrator was at that time (and how to locate
25 him), Mr. McDonald’s due process rights have been violated. He is now gravely prejudiced with
26 the lapse of time, fading of memory and retention of evidence and witnesses. He respectfully
27 requests that this case be dismissed.

ARGUMENT

A. Legal Standard.

The United States Supreme Court held that “a deliberate attempt by the government to use delay to harm the accused, or government delay that is ‘purposeful or oppressive,’ is unjustifiable.”¹ The Court later readdressed this issue, in *United States v. Marion*, and elaborated on the standard. It held that “the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay ... caused substantial prejudice to [a defendant’s] rights to a fair trial and the delay was an intentional device to gain tactical advantage over the accused.”² The Court cautioned, however, that delays due to legitimate investigation would not be sufficient to trigger a due process violation.³

The 9th Circuit heeded the above holdings, and fashioned similar standards for addressing these claims. The 9th Circuit held that:

In order to succeed on [a] claim that he was denied due process because of pre-indictment delay, [the defendant] must satisfy both prongs of a two-part test. First, he must prove ‘actual, nonspeculative prejudice from the delay.’ Second, the length of the delay is weighed against the reasons for the delay and [the defendant] must show that the delay ‘offends those “fundamental conceptions of justice which lie at the base of our civil and political institutions.” ... [The defendant] must show both that lost testimony, witnesses, or evidence ‘meaningfully has impaired his ability defend himself.’⁴

¹ *Dickey v. Florida*, 398 U.S. 30, 51 (1970).

² 404 U.S. 307, 324 (1971).

³ See *United States v. Lovasco*, 431 U.S. 783, 795 (1977) (“[I]nvestigative delay is fundamentally unlike delay undertaken by the Government solely ‘to gain tactical advantage over the accused’ ... a prosecutor abides by [standards of ‘fair play and decency’] if he refuses to seek indictments until completely satisfied that he ... will be able promptly to establish guilt beyond a reasonable doubt”) (internal citations omitted).

⁴ *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1113 (9th Cir. 2007) (internal citations omitted).

1 Our own Supreme Court echoed this standard in *Wyman*, where it held that “[t]o succeed
2 on a due process challenge to pre-indictment delay, the accused must make two requisite
3 showings: (1) that he or she suffered actual, non-speculative prejudice from the delay; and (2)
4 that the prosecution intentionally delayed bringing the charges in order to gain a tactical
5 advantage over the accused, or that the prosecution delayed in bad faith.”⁵ Additionally, federal
6 and state precedent, allow for a finding of prejudice where pre-indictment delay stems from
7 prosecutorial negligence.⁶

8
9 **B. The State’s delay caused Mr. McDonald grave and inexcusable prejudice
10 in presenting his defense against the alleged charges.**

11 Due process requires dismissal of an action due to pre-indictment delay where the
12 delay “caused substantial prejudice to [the defendant’s] rights to a fair trial.”⁷ When
13 making a determination of prejudice due to pre-indictment delay, “the length of the delay
14 ... must be weighed in conjunction with ... the reason for the delay.”⁸ And “negligent
15 failure by the government to ensure a speedy trial is virtually as damaging to the interests
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18 ⁵ *Wyman v. State*, 125 Nev. 592, 601 (2009); *see also Jones v. State*, 96 Nev. 240 (1980) (to
19 provide basis for dismissal an accused must show that the pre-indictment delay prejudiced his
20 right to a fair trial and that the government delayed to gain a tactical advantage).

21 ⁶ *See United States v. Moran*, 759 F.2d 777, 783 (9th Cir. 1985) (“negligent governmental
22 conduct may form a basis for unconstitutional pre-indictment delay”); *United States v.*
23 *Tornabene*, 687 F.2d 312, 317 (9th Cir. 1982) (affirming a denial of defendant’s motion to
24 dismiss where there was no showing of intentional or *negligent* delay) (emphasis added); *State v.*
25 *Autry*, 103 Nev. 552, 557-58 (1987) (the court acknowledging negligence as a means of
26 dismissal, but declining to rule in defendant’s favor due to insufficient evidence); *see also*
27 *People v. Nelson*, 185 P.3d 49, 58 (Cal. 2008) (holding that “under California law, negligent, as
28 well as purposeful, delay in bringing charges may, when accompanied by a showing of
prejudice, violate due process”).

26 ⁷ *Marion*, 404 U.S. at 324.

27 ⁸ *Dickey*, 398 U.S. at 51.

1 protected by the right as an intentional failure.”⁹ Further, a claim of pre-indictment delay
2 due to negligence, against the State, is proper “since the ultimate responsibility for such
3 circumstances must rest with the government rather than defendant.”¹⁰

4 *Loss of Witnesses / evidence (ability to investigate given passage of time)*

5 To date, no contact information has been provided for any of the State’s lay-
6 witnesses associated with this case. As such, investigation has been stymied. Further, if
7 there was, in fact, video footage from the apartment complex in question (as this
8 supposedly occurred at the apartment gym), it has been long-since destroyed. Further,
9 any attendant witnesses (neighbors etc) could not possibly be located.
10

11 Additionally, to date, no legible copy of the SCAN report has been produced.
12 Therefore, the exact wording of the disclosure to medical officials and findings in the
13 exam are unknown. The State has indicated that these records were subpoenaed (as of
14 mid-November 2019), but it is simply too late. There is a fairly sizable chance that they
15 have been destroyed pursuant to retention guidelines/laws. And it does not appear that
16 any photos or video of the exam exist anymore (of course, it is possible that will be
17 returned as a result of the subpoena – but the case has been ongoing for over 18 months
18 now).
19

20 As such, the Defendant’s ability to investigate this very serious case has been
21 inexcusably prejudiced by the State’s (at best) negligence.
22

23 *Loss of memory (of witnesses and defendant)*
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25

26 ⁹ *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977).

27 ¹⁰ *Id.*
28

1 One would expect witnesses to have a lapse in memory after 18+ years has
2 passed. That is even more true where, as here, no witness statements were taken at the
3 time from all attendant witnesses. None (or, at least, none have been provided in
4 Discovery at this time). The only witness statements formally collected in this case were
5 from the Complainant (2017) and from Defendant McDonald (2018). Specifically, in
6 Defendant McDonald's statement, he states throughout that he does not remember. [See
7 Statement, attached hereto as Exhibit A.]
8

9 *Inability to negotiate as part of prior case / bad acts*

10 In 2005, Defendant was charged and entered a plea pursuant to the Alford
11 decision to unrelated charges of sexual assault/lewdness. Because the State did not bother
12 to run his name in the system, these charges were not brought up at the time and were
13 not packaged as part of that negotiation. The inability to globally negotiate a charge is, by
14 nature, extremely prejudicial. Further, the State has now moved (successfully) to
15 introduce client's 2005 case as a prior bad act. So, not only is Mr. McDonald unduly
16 prejudiced by his inability to negotiate the cases together, he is also prejudiced by the fact
17 that he will now certainly be convicted based on this prior conduct (prior conduct that
18 was never actually *proven*, but pled to as part of an Alford plea).
19

20 **C. The State acted negligently and recklessly in processing charges against**
21 **Mr. McDonald.**

22 "The prosecutor should act with diligence and promptness to investigate, litigate, and
23 dispose of criminal charges, consistent with the interests of justice and with due regard for
24 fairness, accuracy, and rights of the defendant, victims, and witnesses."¹¹ Additionally, a
25

26
27 ¹¹ ABA Criminal Justice Standards for the Prosecution Function, Standard 3-1.9(a) (4th ed.),
28 available at

1 prosecutor should act in a manner “so as to not prejudice a criminal matter.”¹² A person acts with
2 negligence, or in a negligent manner, when his or her actions “fall below the legal standard
3 established to protect other against unreasonable risk of harm.”¹³ Further, a person acts
4 recklessly when he or she knows that his or her actions are likely to produce a “substantial and
5 unjustifiable risk” of harm and, in complete disregard for the risk, acts anyway.¹⁴

6 Here, the State¹⁵ has acted negligently by failing to bring forth charges against Mr.
7 McDonald with “diligence and promptness.” Also, the State acted recklessly because it knew
8 that Mr. McDonald would likely be harmed by such a substantial delay, yet still failed to timely
9 take any action. The facts indicate that the State was apprised of Mr. McDonald’s alleged actions
10 on or about December 28, 2001. However, no official charges were brought until the Grand Jury
11 Indictment on or about September 18, 2018; nearly seventeen years later.

12 As the record shows, sufficient investigation was completed by LVMPD detective
13 Richter, and the doctors at Sunrise Hospital, to provide the necessary information to file official
14 charges in 2001/2. Nonetheless, all action ceased upon notification of the case to Sergeant
15 Williams. Moreover, when charges were finally brought and an indictment returned, on or about
16 September 18, 2018, it was on the sole testimony of the alleged victim, S.B. No other testimony,
17 or evidence of any type, was presented. The exact same information used in the 2018 indictment
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21 https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/
22 [on/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/).

23 ¹² *Id.* at 3-1.9(d).

24 ¹³ *Negligence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

25 ¹⁴ *See Recklessly*, BLACK’S LAW DICTIONARY (10th ed. 2014).

26 ¹⁵ “The State” collectively, and individually, references all persons, agents, and agencies in a
27 representative capacity for the State of Nevada; inclusive of the prosecutor, law enforcement,
28 and associated investigative agents.

1 was available to the State in 2001. Thus, this illustrates that the State had sufficient probable
2 cause in 2001 to file official charges and failed to do so for no legitimate reason.

3 Additionally, the record indicated that the State had a second chance, prior to 2018, to file
4 official charges, and failed to act. On or about August 18, 2005, Mr. McDonald was the subject
5 of different sexual assault allegations. He was arrested (apparently, he could be located) and
6 charged. During these proceedings, as much as a name search would have turned up the charges
7 in this case. The State could have pursued action for the 2001 allegations, but again failed to act.
8 Mr. McDonald entered a plea on the 2005 charges and was sentenced to life, with the possibility
9 of parole after 12 years, in the Nevada Department of Corrections. He has remained in NDOC
10 custody since that time, where he will likely stay for the remainder of his life.
11

12 CONCLUSION

13 Because the State, on at least two occasions, failed to proceed against Mr. McDonald
14 with "diligence and promptness," despite having all the necessary evidence for probable cause
15 (as demonstrated by their going forward before the Grand Jury without the delayed DNA and
16 subsequent arguments in their Return to Defendant McDonald's Writ of Habeas Corpus), the
17 State has negligently failed to fulfill its duties. Further, because the State failed to act, knowing
18 that Mr. McDonald was likely to be harmed by the delay, the State has acted recklessly. Due to
19 the State's negligent and reckless actions, Mr. McDonald suffered "substantial and unjustifi[ed]"
20 prejudice against his ability to defend himself and this action should be dismissed.
21
22

23 DATED this 20th day of November, 2019.

24 PHILIP J. KOHN
25 CLARK COUNTY PUBLIC DEFENDER

26 By: /s/ Tegan C. Machnich
27 TEGAN C. MACHNICH #11642
28 Chief Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion to Dismiss on for hearing before the Court on the 2nd day of December, 2019, at 8:30 a.m. in Department 10 of the District Court.

DATED this 20th day of November, 2019.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ /s/ Tegan C. Machnich
TEGAN C. MACHNICH #11642
Chief Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing Motion to Dismiss was served via electronic e-filing to the Clark County District Attorney's Office on this 20th day of November, 2019.

District Attorney's Office
E-Mail Address:
Jennifer.Georges@clarkcountyda.com

By: /s/ Annie McMahan
An employee of the
Clark County Public Defender's Office

EXHIBIT A

**PLEADING
CONTINUES
IN NEXT
VOLUME**