IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

JOSHUA COUNSIL, **Case No. 85858**

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

APPELLANT'S APPENDIX
VOLUME 2

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PD 9-2-16

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DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

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ORDER GRANTING MOTION FOR RECONSIDERATION OF MOTION FOR QUALIFIED PROTECTIVE ORDER AND MODIFYING QUALFIED PROTECTIVE ORDER

THIS MATTER having come before the Court on the Motion for Reconsideration of Order Granting the Defendant's Motion for a Qualified Protective Order, the Court having reviewed the Motion, and good cause appearing, now therefore,

IT IS HEREBY ORDERED that the Motion for Reconsideration is GRANTED; and

IT IS FURTHER ORDERED that the Qualified Protective Order previously granted is hereby RESCINDED; and

IT IS FURTHER ORDERED that prior to obtaining any medical records through the use of the qualified protective order, the Defendant (or the State if the State desires to use such an order) must file a specific motion, setting forth the name of the provider, the dates of treatment and an articulated reasonable basis to believe that those records may be relevant to either party's case in chief or any defense the Defendant he may present. After briefing, the Court will determine whether a qualified protective order is appropriate to obtain those

specific record; and

IT IS FURTHER ORDERED, due to the extremely sensitive nature of the records being sought, any qualified protective order must state that all records are to be provided to the Court for *in camera* review prior to any dissemination to the parties. If the Court determines that the records are relevant and not otherwise unfairly prejudicial, inflammatory or inadmissible, the Court will order that the records be produced to the parties; and

IT IS FURTHER ORDERED that, in the event the Defendant has already obtained any records through the use of the Qualified Protective Order previously issued, that any and all records so obtained must be provided to the Court within seven (7) business days of the date of this order. If the Court determines any relevant records were obtained, the Court will authorize their release to the parties.

DATED this 21 day of August, 2018.

JAMES E. WILSON, JR.
DISTRICT JUDGE

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

OPPOSITION TO MOTION TO SEVER COUNT VI FROM COUNTS I-V

COMES NOW, the Plaintiff, STATE OF NEVADA, by and through counsel, JASON D. WOODBURY, District Attorney and Melanie A. Brantingham, Deputy District Attorney in and for Carson City, State of Nevada, and hereby opposes the Motion to Sever Count VI from Counts I-V, filed by the Defendant, JOSHUA DOUGLAS COUNSIL, by and through his counsel of record, William M. Murphy, Esq.

This opposition is made and based upon the accompanying points and authorities, all pleadings and papers on file herein, and the arguments of counsel at any hearing the Court deems appropriate with respect to this matter.

DATED this 23rd day of August, 2018.

JASON D. WOODBURY
District Attorney

By: Melanie A. Brantingham
MELANIE A. BRANTINGHAM
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

On July 2, 2017, E.D. (age 6) reported to her mother that the Defendant, Joshua Counsil, had touched her inappropriately. PHT 35, 41 (date of initial disclosure by E.D.). She told her mother that he sticks his hands down her pants and puts his fingers inside her "crotch". PHT 35-36. E.D. further disclosed that the Defendant had been sexually assaulting her since approximately May, 2015.

Two days later, on July 4, 2017, Janee spoke with L.S., her 13 year old daughter, regarding the disclosures made to her by E.D. L.S.'s reaction was "he went after her too," and she was very angry. PHT 41. Janee asked L.S. what she meant by that statement. L.S. disclosed that the Defendant had been making "advances" towards her for as long as she could remember, and that he had asked her to perform fellatio on him numerous times. PHT 41-42.

On July 6, 2017, Janee Smith arrived at the Sheriff's Office, with L.S. and E.D., to report that the Defendant had sexually assaulted both L.S. and E.D. PHT 15. Deputy Justin Whitehead met with Janee and her daughter L.S. at that time. PHT 15-16. During the meeting, Janee gave an approximate date range for the sexual assault perpetrated on E.D. as May, 2015 through June 15, 2017. *See,* Deputy Whitehead's report attached hereto as Exhibit 2.

L.S. disclosed to Deputy Whitehead that, when she was 9 years old, and lived at 400 W. Winne Ln., she and the Defendant were playing games in her room. While the Defendant was in L.S.'s bedroom, he unzipped his pants, exposed his penis, and asked L.S. to "lick it like a lollipop." PHT 20.

Deputy Whitehead turned the investigation of this matter over to detectives at that point. PHT 21. Detective Sal Acosta was assigned to investigate this case. PHT 94-95. Detective Acosta made arrangements for the children to go to the Child Advocacy Center ("CAC") in Washoe County, Nevada, for forensic interviews. PHT 95. He also went to the CAC on the date of the interviews, and observed them in real time via audio and video

conference. PHT 96.

The interviews were conducted by Alexis Auckenthaler at the CAC, on the same day. PHT 60. Ms. Auckenthaler first interviewed L.S., who made a partial disclosure regarding the incident which occurred when she was 9 years old. After Ms. Auckenthaler interviewed L.S., she interviewed E.D. PHT 66. During that interview, E.D. made numerous disclosures of sexual abuse perpetrated against her by the Defendant.

Following the interview, Detective Sal Acosta undertook additional investigation, including interviewing the girls' mother, visiting the location where the acts perpetrated against E.D. occurred, and attempting to interview the Defendant. Subsequently, the Defendant was charged in a single criminal complaint for the acts committed against both of his nieces. The matter proceeded to preliminary hearing on December 13, 2017, and was bound over to District Court. The Criminal Information in this case was filed on December 14, 2017, and the Amended Criminal Information was filed on December 18, 2017. Defendant now seeks to sever Count VI of the Criminal Information from Counts I-V, asserting that joinder is improper under NRS 173.115 and 174.165. As set forth below, the Motion should be denied.

II. ARGUMENT.

A. JOINDER OF THE COUNTS I-V WITH COUNT VI IS LEGALLY PROPER.

NRS 173.115 provides, in pertinent part, as follows:

> 1. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or gross misdemeanors or both, are:
>
> (a) Based on the same act or transaction; or
>
> (b) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

In this case, the acts are connected together, in that they were reported by the victims, and investigated, at the same time, and were perpetrated on sisters. The Nevada Supreme Court recently revisited the issue of joinder and provided significant guidance on the issue in *Farmer v. State*, 405 P.3d 114 (Nev. 2017). Regarding the issue of joinder, the Court set forth the analysis to be conducted by the District Court as follows:

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An examination of this court's jurisprudence applying NRS 173.115(2) reveals that, historically, this court has focused on whether the offenses shared certain elements in common when determining whether they were properly joined, at least insofar as those similarities were striking enough to suggest that the offenses were committed as part of a scheme or plan. In *Mitchell v. State*, for example, we held that the trial court erred by joining charges arising from two separate incidents, 45 days apart, where the defendant sexually assaulted women after taking them to the same bar. 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989), In doing so, we noted that there were some minor similarities between the two incidents, but not enough to suggest that the incidents were committed pursuant to design: "[T]aking two different women dancing and later attempting intercourse [cannot] be considered part of a common plan just because the women are taken in part to the same bar." But in *Shannon v. State*, we held that the trial court appropriately joined charges arising out of two separate incidents where the defendant met his young victims, both of the same age group, through his role as leader of a canoe club, placed himself in a position of trust over them, then committed sexual acts on them while on canoe trips. 105 Nev. 782, 786, 783 P.2d 942, 944 (1989). In upholding that decision, we stated that "[g]iven the closeness of the acts, the similar circumstances, and the same modus operandi, the criterion of a common scheme or plan was sufficiently satisfied." *Id.* We used the same analysis in other cases, conducting a fact-specific inquiry comparing the offenses to be joined and discussing whether there were sufficient connections to give rise to the inference that the offenses were committed pursuant to a common scheme or plan rather than unrelated crimes of the same ilk. *E.g.*, *Middleton v. State*, 114 Nev. 1089, 1107, 968 P.2d 296, 308-09 (1998); *Tillema v. State*, 112 Nev. 266, 269, 914 P.2d 605, 607 (1996); *Graves v. State*, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996); *Griego v. State*, 111 Nev. 444, 449, 893 P.2d 995, 999 (1995), abrogated on other grounds by *Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000).

Although our analyses focused on whether the joined offenses shared features in common, we were not always clear regarding which portion of NRS 173.115(2) we were relying upon in reaching our decisions. *See, e.g., State v. Boueri*, 99 Nev. 790, 796, 672 P.2d 33, 37 (1983). In *Weber v. State*, this court took its first real stab at providing guidance regarding the phrase "connected together or constituting parts of a common scheme or plan." 121 Nev. 554, 571-73, 119 P.3d 107, 119-20 (2005). Looking to our prior cases, we held that offenses were "connected together" when evidence of the offenses would be cross-admissible at separate trials, a consideration that had always floated around in our prior decisions but had not been moored to any particular language in the joinder statute. Id. at 573, 119 P.3d at 120. We also defined the words "scheme" and "plan" for the first time. Id. at 572, 119 P.3d at 119-20. Looking to Black's Law Dictionary, we defined scheme as "a design or plan formed to accomplish some purpose; a system," and plan as "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal." *Id.* (internal quotation marks omitted). We then considered the facts of that case in the context of those definitions and held that the offenses were connected together but were not adequately shown to have been parts of a common scheme or plan. Id. at 573, 119 P.3d at 120.

Farmer argues that Weber changed the joinder calculus. Specifically, he argues that Weber eliminated any consideration of whether the offenses to be joined share sufficient similarities and refocused the analysis on whether each offense was a pre-planned step up the ladder toward a specific, predetermined

goal. Farmer reads *Weber* too narrowly. Nothing in *Weber* (or the prior-bad-acts line of cases upon which he also relies) indicates an intent to overrule decades of this court's joinder jurisprudence. We recognize, however, that *Weber's* definitions of "scheme" and "plan" arguably leave little room for the broader similarity analysis that we have historically employed in joinder cases. Nothing about those definitions is facially wrong, and *Weber's* holding was correct based on the facts of that case. But *Weber* construed the words "scheme" and "plan" as synonyms. Defining different words, separated by the conjunction "or," to mean the same thing is incorrect under the canons of statutory interpretation. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), overruled in part on other grounds by *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). And interpreting "scheme" and "plan" as having nearly identical meanings ignored the common usage of the words in the evidentiary context. See generally David. P. Leonard, The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events § 9.2.2 (2009).

Contrary to our discussion in *Weber*, the words "scheme" and "plan" as used in NRS 173.115(2) have different implications and ground different theories of joinder. Instead of reading NRS 173.115(2)'s "parts of a common scheme or plan" language as one phrase with one meaning, NRS 173.115(2) is properly understood as permitting joinder if the offenses are "parts of a common scheme" or "parts of a common plan." And "the terms 'common scheme' and 'common plan' are not synonymous." *Scott v. Commonwealth*, 274 Va. 636, 651 S.E.2d 630, 635 (Va. 2007). In the joinder context, "the term 'common plan' describes crimes that are related to one another for the purpose of accomplishing a particular goal." *Id*. In contrast, "[t]he term 'common scheme' describes crimes that share features idiosyncratic in character." *Id*.

Thus, in addition to rejecting any reading of *Weber* that would suggest a narrowing of our decisions, we clarify that the similarity analysis in our prior decisions derives from NRS 173.115(2)'s language that offenses may be joined when they are committed as parts of a common scheme. While there may be valid reasons to limit the circumstances in which different offenses may be joined, defining the "common scheme" theory of joinder as we do is not only consistent with its understanding in the evidentiary context, giving independent meaning to the word "scheme" where there otherwise would be none, it is consistent with our well-settled understanding of NRS 173.115(2) and the traditional understanding of joinder generally. See Clifford S. Fishman & Ann T. McKenna, Jones on Evidence: Civil and Criminal § 17:17 (7th ed. Supp. 2016) ("Separate crimes committed with a similar, unusual modus operandi, or with sufficient similar characteristics, also may be joined for trial.").

While this is a lengthy quote, it is important to understand the entirety of the Court's analysis in defining the terms "connected together" and "common scheme" in the context of determining whether joinder is appropriate. Here, the offenses committed against both E.D. and L.S. are both connected together *and* part of a common scheme.

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1. The Offenses committed against E.D. and L.S. are connected together, making joinder appropriate.

As recognized above, offenses are "connected together" when evidence of the offenses would be cross-admissible at separate trials. *Weber*, *supra*. Here, the offenses connected together because, similar to the *Shannon* case referenced in the *Farmer* analysis, the Defendant was the uncle of both girls. He used his position as a trusted family member to gain access to each girl (both in the same age range when the acts were perpetrated), and then, when left alone with the girls, used that relationship of trust to sexually assault or commit lewd acts with them, making various promises to each of them in an effort to secure their silence.

In addition, the evidence of each would be admissible in the trial of the other, pursuant to NRS 48.045(2) to prove intent, motive, opportunity, plan, and lack of mistake or accident. It has long been recognized that, in sex offense cases, the courts have adopted "a more liberal judicial attitude . . . in admitting evidence of prior and subsequent proscribed sexual conduct." *McMichael v. State,* 94 Nev. 184, 577 P.2d 398, 1978 Nev. LEXIS 519 (Nev. 1978), *overruled*, *Meador v. State*, 101 Nev. 765, 711 P.2d 852, 1985 Nev. LEXIS 503 (Nev. 1985), *overruled*, *Braunstein v. State*, 118 Nev. 68, 40 P.3d 413, 118 Nev. Adv. Rep. 8, 2002 Nev. LEXIS 8 (Nev. 2002), *overruled in part as stated in, Bolin v. Baker*, 2015 U.S. Dist. LEXIS 18218 (D. Nev. Feb. 13, 2015).

For example, in *Findley v. State*[1], 94 Nev. 212, 577 P.2d 867, 1978 Nev. LEXIS 524 (Nev. 1978), *overruled*, *Braunstein v. State*, 118 Nev. 68, 40 P.3d 413, 118 Nev. Adv. Rep. 8, 2002 Nev. LEXIS 8 (Nev. 2002), *overruled in part as stated in, Bolin v. Baker*, 2015 U.S. Dist. LEXIS 18218 (D. Nev. Feb. 13, 2015), the Defendant was charged with lewdness with a child under the age of fourteen years, based on allegations that he had placed his hand upon the five-year-old victim's "private parts" on several occasions. The Defendant denied that this had occurred. During the State's case in chief, two adult women were permitted to testify, over objection, that the Defendant, some nine years earlier, had molested them in the same way.

[1] Although both *McMichael* and *Findley* have been overruled on other grounds, they are not overruled on the matters for which they are cited in this brief.

Id. On appeal, the Nevada Supreme Court approved of the District Court's decision to admit the testimony of the adult witnesses to prove intent, or the absence of mistake or accident, recognizing, in a sex crime case, intent, by reason of the words of the statute, is an element of the crime and directly placed in issue by the not guilty plea of the accused. *Id.*, *citing*, *Overton v. State*, 78 Nev. 198, 205, 370 P.2d 677 (1962). The Court went on to state that, although the other acts of molestation were remote in point of time, and may for that reason impeach credibility to some degree, they remained admissible. *Id.*, *citing*, *Bails v. State*, 92 Nev. 95, 545 P.2d 1155 (1976); *Bishop v. State*, 92 Nev. 510, 554 P.2d 266 (1976).

As to the use of the other acts testimony to prove motive, the Nevada Supreme Court has previously held that the probative value of explaining to the jury what motivates an adult man who is in a position to care for and protect a family member, to instead repeatedly sexually abuse that family member is very high. *Ledbetter v. State*, 122 Nev. 252, 129 P.3d 671, 122 Nev. Adv. Rep. 22, 2006 Nev. LEXIS 26 (Nev. 2006). In *Ledbetter*, the Court found that evidence of the defendant's prior acts of sexual abuse of other young victims showed his sexual attraction to, and obsession with, the young female members of his family, which explained to the jury his motive to sexually assault the victim. *Id.*

The propriety of the use of this type of evidence to prove motive was recently confirmed in *Stone v. State*, 2016 Nev. App. LEXIS 203 (Nev. Ct. App. May 17, 2016), where the Court again recognized, in a prosecution for sexual assault against a child under the age of 14 years, the district court did not abuse its discretion by admitting the prior bad act testimony of three witnesses that defendant had previously sexually assaulted them. The evidence of the prior acts was highly probative and explained to the jury defendant's motive to sexually assault the victim[2].

Likewise, in this case, although there is approximately a two year gap in the two allegations, the testimony of L.S. would be admissible in E.D.'s trial, and vice versa, to rebut the defense's denial that the acts occurred. It would further be admissible to prove intent, as

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[2] Although not specifically reflected in the opinion, this Court can certainly take judicial notice that the time gap between the prior acts at issue in the Stone case and the underlying charges is approximately 7 years. This was a First Judicial District Court case and, as such, the briefs are accessible to this Court.

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set forth in the *Findlay* case. Most significantly, and squarely in line with *Ledbetter* and *Stone*, it would be admissible to prove motive – sexual attraction to, and obsession with, the young female members of his family. Because the evidence of the separate offenses would be cross-admissible in separate trials, under *Weber*, these offense are connected together joinder is appropriate. Based upon all of the applicable statutory and case authority, joinder is appropriate under NRS 173.115(2), and the Defendant's Motion to Sever should be denied.

2. Joinder is Appropriate Because the Separate Acts Reflect a Common Scheme.

The acts perpetrated by the Defendant also constitute a common scheme. As noted in *Farmer*:

> When determining whether a common scheme exists, courts ask whether the offenses share such a concurrence of common features as to support the inference that they were committed pursuant to a common design. State v. Lough, 125 Wn.2d 847, 889 P.2d 487, 494 (Wash. 1995). Features that this court has deemed relevant to this analysis include (1) degree of similarity of offenses, *Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003); (2) degree of similarity of victims, *id.* at 303, 72 P.3d at 590; (3) temporal proximity, *Mitchell*, 105 Nev. at 738, 782 P.2d at 1342; (4) physical proximity, *Griego*, 111 Nev. at 449, 893 P.2d at 999; (5) number of victims, *id.*; and (6) other context-specific features. No one fact is dispositive, and each may be assessed different weight depending on the circumstances. *Weber*, 121 Nev. at 572, 119 P.3d at 119 ("Determining whether a common scheme or plan existed in this, or any, case requires fact-specific analysis.").

Id. at 121.

Here, the offenses were similar in nature, involving inappropriate sexual conduct with two vulnerable minor children. The children are sisters and, as such, are very similar victims. The acts were not committed exceptionally close in time; however, the time gap led to the assaults occurring when the victims were in a similar age range (6 and 9 years old). The victims are further connected in that they are the Defendant's nieces. The Defendant used his status as a trusted family member to gain access to each of the children, and after obtained access, preyed upon these young, vulnerable victims. The fact-specific analysis in this case demonstrates that a common scheme existed in the Defendant's sexual misconduct with the victims and, as such, joinder is appropriate.

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B. JOINDER IS NOT UNFAIRLY PREJUDICIAL TO THE DEFENDANT, BUT SEVERANCE WOULD BE PREJUDICIAL TO THE STATE IN THIS CASE.

The Defendant argues in his Motion that, even if joinder is legally appropriate, it would be unfairly prejudicial to the Defendant because, necessarily, the jury would convicted based upon a determination of propensity just because two victims testified. He somehow claims to clairvoyantly understand the psychological thought processes of a yet unpicked jury, by stating that although a limiting instruction could be given, "an instruction cannot reverse the natural psychological thought process of the jury." There is simply no authority to support this claim. In fact, the case authority stands for the opposite proposition. Virtually the same argument was made in the *Farmer* case, *supra*, unsuccessfully.

The *Farmer* Court, in addressing the argument that it was unfairly prejudicial to join the counts related to separate victims, found that the state was permitted to, and did properly, argue that the number of victims and the similarity of their stories was evidence that the offenses occurred as the victims claims, citing the "doctrine of chances" which provides that ***sexual molestation charges involving separate victims may be cross-admissible where the defense is the accusations are false or the victims mistaken***. *Id*. The Court went on to state that such an argument was not an impermissible attack on Farmer's character nor did it unfairly invite the jury to make improper character inferences. *Id.* The Court recognized, contrary to the Defendant's assertions here, that jurors are capable of carefully considering the elements of each offense under the circumstances. *Id*.

On the other hand, the cost to the State of trying this case twice is significant. Two jury trials will have to be held, at significant expense to the taxpayers, to examine the same witnesses and present the same evidence. Furthermore, the prejudice to the victims and their families cannot be ignored. The entire family will have to re-live these horrific events at not one, but two, separate jury trials. There is no basis to impose this sort of torture on this family, where the courts recognize that a jury will be fully capable of considering the elements of each offense related to each victim. Because a joint trial is not unfairly prejudicial to the Defendant, the Motion to Sever should be denied.

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III. CONCLUSION.

In this case, joinder of Counts I-V, involving E.D., with Count VI, involving L.S., is proper under NRS 173.115(2) and all related case authority. The Defendant is not unfairly prejudiced by the joinder and, as such, severance is not otherwise required. On that basis, the Motion to Sever should be denied.

DATED this 23rd day of August, 2018.

JASON D. WOODBURY
District Attorney

By: Melanie A. Brantingham
MELANIE A. BRANTINGHAM
Deputy District Attorney
Nevada Bar No. 9152

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Carson City District Attorney and that on this 23rd day of August, 2018, I caused to be served a copy of the foregoing document, titled: **OPPOSITION TO MOTION TO SEVER COUNT VI FROM COUNTS I-V** by faxing and placing a copy of said document in the Public Defender's Box for pickup, addressed to:

William M. Murphy, Esq.
Nevada State Public Defender's Office
511 E. Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 687-4993

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Carson City, Nevada
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JASON D. WOODBURY
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SUSAN MERRIWETHER
CLERK
BY V. Alcorn
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

Office of the District Attorney
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SECOND AMENDED CRIMINAL INFORMATION

STATE OF NEVADA)
):ss
CARSON CITY)

JASON D. WOODBURY, District Attorney in and for Carson City, State of Nevada, by MELANIE A. BRANTINGHAM, Deputy District Attorney, in the name and by the authority of the State of Nevada, informs the Court that JOSHUA DOUGLAS COUNSIL, the Defendant, above-named, on or between the 25th day of January, 2013, and the 15th day of June, 2017, and before the filing of this Information, at Carson Township, in Carson City, State of Nevada, has committed the crimes of **SEXUAL ASSAULT/SEXUAL ASSAULT AGAINST A CHILD UNDER THE AGE OF 14 YEARS**, a category A Felony as defined by NRS 200.366(1) and (3) (Count I); **SEXUAL ASSAULT AGAINST A CHILD UNDER THE AGE OF 14 YEARS**, a category A Felony as defined by NRS 200.366(1) and (3) (Counts II-III); **LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE**, a category A Felony as defined by NRS 201.230 (Count

IV) and **ATTEMPTED LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE**, a category B felony as defined by NRS 201.230 and NRS 193.330 (Count V), in the manner following:

Count I

SEXUAL ASSAULT/SEXUAL ASSAULT AGAINST A CHILD UNDER THE AGE OF 14 YEARS

("A" Felony – NRS 200.366(1) and(3))

That the Defendant, Joshua Douglas Counsil, on or between May 1, 2015 and September 30, 2015, at Carson Township, in Carson City, State of Nevada, did willfully and unlawfully subject another person to sexual penetration, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct and/or on or between October 1, 2015 and June 15, 2017, did willfully and unlawfully commit a sexual penetration upon a child under the age of 14 years, in the manner following, to wit: the Defendant inserted his penis and/or fingers into the vagina of E.D. (DOB 8/29/2010), on approximately 10 occasions, in a bathroom at his grandmother's residence, between May 1, 2015 and June 15, 2017, at or near 2349 Dori Way, Unit B, Carson City, Nevada.

Count II

SEXUAL ASSAULT AGAINST A CHILD UNDER THE AGE OF 14 YEARS

("A" Felony – NRS 200.366(1) and (3))

That the Defendant, Joshua Douglas Counsil, on or about December 25, 2015, at Carson Township, in Carson City, State of Nevada, did willfully and unlawfully commit a sexual penetration upon a child under the age of 14 years, in the manner following: the Defendant inserted his penis into the vagina of E.D. (DOB 8/29/2010), in a bathroom at his grandmother's residence, at or near 2349 Dori Way, Unit B, Carson City, Nevada.

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Count III

SEXUAL ASSAULT AGAINST A CHILD UNDER THE AGE OF 14 YEARS

("A" Felony – NRS 200.366(1) and (3))

That the Defendant, Joshua Douglas Counsil, on or between December 25, 2015 and June 15, 2017, at Carson Township, in Carson City, State of Nevada, did willfully and unlawfully commit a sexual penetration upon a child under the age of 14 years, in the manner following: the Defendant inserted a plastic "Barbie" doll into the vagina of E.D. (DOB 8/29/2010), in a bathroom at his grandmother's residence, at or near 2349 Dori Way, Unit B, Carson City, Nevada.

Count IV

LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE

("A" Felony – NRS 201.230)

That the Defendant, Joshua Douglas Counsil, on or between December 25, 2015 and June 16, 2017, at Carson Township, in Carson City, State of Nevada, did willfully and lewdly commit 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, in the manner following: the Defendant performed cunnilingus or otherwise placed his mouth and/or tongue into or on the vagina of E.D. (DOB 8/29/2010) all of which occurred in a bathroom at his grandmother's residence, at or near 2349 Dori Way, Unit B, Carson City, Nevada.

Count V

ATTEMPTED LEWDNESS WITH A CHILD UNDER 14 YEARS OF AGE

("B" Felony – NRS 201.230 and NRS 193.330)

That the Defendant, Joshua Douglas Counsil, on or between January 25, 2013 and June 30, 2013, at Carson Township, in Carson City, State of Nevada, did willfully and lewdly attempt to commit 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, in the manner following: the Defendant took his penis out of his pants and asked L.S. (DOB 1/25/2004) to "lick it like a lollipop," all of which occurred in a bedroom, at or near 400 W. Winne Lane, Carson City, Nevada, when L.S. was approximately 9 years old.

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

DATED this 24th day of August, 2018.

JASON D. WOODBURY
District Attorney

By: Melanie A. Brantingham
MELANIE A. BRANTINGHAM
Deputy District Attorney
Nevada Bar No. 9152

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The following are the names of such witnesses for the State of Nevada as are known to me at the time of filing this Information:

Brett John Bindley
Carson City Sheriff's Office
911 E. Musser Street
Carson City, NV 89701

Sal Acosta
Carson City Sheriff's Office
911 E. Musser Street
Carson City, NV 89701

Sgt. Daniel Gonzales
Carson City Sheriff's Office
911 E. Musser Street
Carson City, NV 89701

Justin Whitehead
Carson City Sheriff's Office
911 E. Musser Street
Carson City, NV 89701

CCSO Dispatch Center
4645 Snyder Avenue
Carson City, NV 89701

Carson City Sheriff's Office Crime Lab
911 E. Musser Street
Carson City, NV 89701

Jeannine Counsil
2349 Dori Way Unit A
Carson City, NV 89706

James Michael White

Child Advocacy Center - Reno
2097 Longley Lane
Reno, NV 89502

Janee Morgan Smith
1210 Banner Avenue
Silver Springs, NV 89429

China Scott

E.D., a Minor
1210 Banner Avenue
Silver Springs, NV 89429

L.S., a Minor
1210 Banner Avenue
Silver Springs, NV 89429

Jeffrey Counsil
2349 Dori Way Unit A
Carson City, NV 89701

Patricia Franklin
2349 Dori Way Unit B
Carson City, NV 89701

Katherine Kimball
2349 Dori Way Unit B
Carson City, NV 89706

Heidi Figueroa

Alexis Auckenthaler
Child Advocacy Center 2097 Longley Lane
- Forensic Interviewer
Reno, NV 89502

David Warner
2206 East Long Street Apt. B
Carson City, NV 89701

Karlie Callahan
Reno Police Department Victim Advocate

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Attorney for Plaintiff

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CLERK
BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 77096

Dept. No. II

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ORDER DENYING MOTION TO SEVER

THIS MATTER having come before the Court on the Motion to Sever Count V from Counts I-IV, filed by the Defendant, JOSHUA DOUGLAS COUNSIL, by and through his counsel of record, William M. Murphy, Esq., the Court having reviewed the Motion and the Opposition thereto filed by the Plaintiff, STATE OF NEVADA, by and through counsel, JASON D. WOODBURY, District Attorney and Melanie A. Brantingham, Deputy District Attorney, the Court having reviewed all pleadings and papers on file herein, and good cause otherwise appearing, now therefore, the Court hereby finds as follows:

FINDINGS OF FACT

On July 2, 2017, E.D. (age 6) reported to her mother that the Defendant, Joshua Counsil, had touched her inappropriately. She told her mother that he sticks his hands down her pants and puts his fingers inside her "crotch". E.D. further disclosed that the Defendant had been sexually assaulting her since approximately May, 2015.

////

Two days later, on July 4, 2017, Janee spoke with L.S., her 13 year old daughter, regarding the disclosures made to her by E.D. L.S.'s reaction was "he went after her too," and she was very angry. Janee asked L.S. what she meant by that statement. L.S. disclosed that the Defendant had been making "advances" towards her for as long as she could remember, and that he had asked her to perform fellatio on him numerous times.

On July 6, 2017, Janee Smith arrived at the Sheriff's Office, with L.S. and E.D., to report that the Defendant had sexually assaulted both L.S. and E.D. Deputy Justin Whitehead met with Janee and her daughter L.S. at that time. During the meeting, Janee gave an approximate date range for the sexual assault perpetrated on E.D. as May, 2015 through June 15, 2017.

L.S. disclosed to Deputy Whitehead that, when she was 9 years old, and lived at 400 W. Winne Ln., she and the Defendant were playing games in her room. While the Defendant was in L.S.'s bedroom, he unzipped his pants, exposed his penis, and asked L.S. to "lick it like a lollipop."

Deputy Whitehead turned the investigation of this matter over to detectives at that point. Detective Sal Acosta was assigned to investigate this case. Detective Acosta made arrangements for the children to go to the Child Advocacy Center ("CAC") in Washoe County, Nevada, for forensic interviews. He also went to the CAC on the date of the interviews, and observed them in real time via audio and video conference.

The interviews were conducted by Alexis Auckenthaler at the CAC, on the same day. PHT 60. Ms. Auckenthaler first interviewed L.S., who made a partial disclosure regarding the incident which occurred when she was 9 years old. After Ms. Auckenthaler interviewed L.S., she interviewed E.D. During that interview, E.D. made numerous disclosures of sexual abuse perpetrated against her by the Defendant.

Following the interview, Detective Sal Acosta undertook additional investigation, including interviewing the girls' mother, visiting the location where the acts perpetrated against E.D. occurred, and attempting to interview the Defendant. Subsequently, the Defendant was charged in a single criminal complaint for the acts committed against both of his nieces. The

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matter proceeded to preliminary hearing on December 13, 2017, and was bound over to District Court. A single Criminal Information in this case was filed on December 14, 2017, and an Amended Criminal Information was filed on December 18, 2017.

Based upon these Findings of Fact, the Court now concludes as follows:

CONCLUSIONS OF LAW

A. JOINDER OF THE COUNTS I-V WITH COUNT VI IS LEGALLY PROPER.

NRS 173.115 provides, in pertinent part, as follows:

> 1. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or gross misdemeanors or both, are:
>
> (a) Based on the same act or transaction; or
>
> (b) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

In this case, the Court concludes that the acts are connected together, in that they were reported by the victims, and investigated, at the same time, and were perpetrated on sisters. The Nevada Supreme Court recently revisited the issue of joinder and provided significant guidance on the issue in *Farmer v. State*, 405 P.3d 114 (Nev. 2017). Regarding the issue of joinder, the Court set forth the analysis to be conducted by the District Court as follows:

> An examination of this court's jurisprudence applying NRS 173.115(2) reveals that, historically, this court has focused on whether the offenses shared certain elements in common when determining whether they were properly joined, at least insofar as those similarities were striking enough to suggest that the offenses were committed as part of a scheme or plan. In *Mitchell v. State*, for example, we held that the trial court erred by joining charges arising from two separate incidents, 45 days apart, where the defendant sexually assaulted women after taking them to the same bar. 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989), In doing so, we noted that there were some minor similarities between the two incidents, but not enough to suggest that the incidents were committed pursuant to design: "[T]aking two different women dancing and later attempting intercourse [cannot] be considered part of a common plan just because the women are taken in part to the same bar." But in *Shannon v. State*, we held that the trial court appropriately joined charges arising out of two separate incidents where the defendant met his young victims, both of the same age group, through his role as leader of a canoe club, placed himself in a position of trust over them, then committed sexual acts on them while on canoe trips. 105 Nev. 782, 786, 783 P.2d 942, 944 (1989). In upholding that decision, we stated that "[g]iven the closeness of the acts, the similar circumstances, and

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the same modus operandi, the criterion of a common scheme or plan was sufficiently satisfied." *Id.* We used the same analysis in other cases, conducting a fact-specific inquiry comparing the offenses to be joined and discussing whether there were sufficient connections to give rise to the inference that the offenses were committed pursuant to a common scheme or plan rather than unrelated crimes of the same ilk. *E.g.*, *Middleton v. State*, 114 Nev. 1089, 1107, 968 P.2d 296, 308-09 (1998); *Tillema v. State*, 112 Nev. 266, 269, 914 P.2d 605, 607 (1996); *Graves v. State*, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996); *Griego v. State*, 111 Nev. 444, 449, 893 P.2d 995, 999 (1995), abrogated on other grounds by *Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000).

Although our analyses focused on whether the joined offenses shared features in common, we were not always clear regarding which portion of NRS 173.115(2) we were relying upon in reaching our decisions. *See, e.g., State v. Boueri*, 99 Nev. 790, 796, 672 P.2d 33, 37 (1983). In *Weber v. State*, this court took its first real stab at providing guidance regarding the phrase "connected together or constituting parts of a common scheme or plan." 121 Nev. 554, 571-73, 119 P.3d 107, 119-20 (2005). Looking to our prior cases, we held that offenses were "connected together" when evidence of the offenses would be cross-admissible at separate trials, a consideration that had always floated around in our prior decisions but had not been moored to any particular language in the joinder statute. Id. at 573, 119 P.3d at 120. We also defined the words "scheme" and "plan" for the first time. Id. at 572, 119 P.3d at 119-20. Looking to Black's Law Dictionary, we defined scheme as "a design or plan formed to accomplish some purpose; a system," and plan as "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal." *Id.* (internal quotation marks omitted). We then considered the facts of that case in the context of those definitions and held that the offenses were connected together but were not adequately shown to have been parts of a common scheme or plan. Id. at 573, 119 P.3d at 120.

Farmer argues that Weber changed the joinder calculus. Specifically, he argues that Weber eliminated any consideration of whether the offenses to be joined share sufficient similarities and refocused the analysis on whether each offense was a pre-planned step up the ladder toward a specific, predetermined goal. Farmer reads *Weber* too narrowly. Nothing in *Weber* (or the prior-bad-acts line of cases upon which he also relies) indicates an intent to overrule decades of this court's joinder jurisprudence. We recognize, however, that *Weber's* definitions of "scheme" and "plan" arguably leave little room for the broader similarity analysis that we have historically employed in joinder cases. Nothing about those definitions is facially wrong, and *Weber's* holding was correct based on the facts of that case. But *Weber* construed the words "scheme" and "plan" as synonyms. Defining different words, separated by the conjunction "or," to mean the same thing is incorrect under the canons of statutory interpretation. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), overruled in part on other grounds by *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). And interpreting "scheme" and "plan" as having nearly identical meanings ignored the common usage of the words in the evidentiary context. See generally David. P. Leonard, The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events § 9.2.2 (2009).

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> Contrary to our discussion in *Weber*, the words "scheme" and "plan" as used in NRS 173.115(2) have different implications and ground different theories of joinder. Instead of reading NRS 173.115(2)'s "parts of a common scheme or plan" language as one phrase with one meaning, NRS 173.115(2) is properly understood as permitting joinder if the offenses are "parts of a common scheme" or "parts of a common plan." And "the terms 'common scheme' and 'common plan' are not synonymous." *Scott v. Commonwealth*, 274 Va. 636, 651 S.E.2d 630, 635 (Va. 2007). In the joinder context, "the term 'common plan' describes crimes that are related to one another for the purpose of accomplishing a particular goal." *Id.* In contrast, "[t]he term 'common scheme' describes crimes that share features idiosyncratic in character." *Id.*
>
> Thus, in addition to rejecting any reading of *Weber* that would suggest a narrowing of our decisions, we clarify that the similarity analysis in our prior decisions derives from NRS 173.115(2)'s language that offenses may be joined when they are committed as parts of a common scheme. While there may be valid reasons to limit the circumstances in which different offenses may be joined, defining the "common scheme" theory of joinder as we do is not only consistent with its understanding in the evidentiary context, giving independent meaning to the word "scheme" where there otherwise would be none, it is consistent with our well-settled understanding of NRS 173.115(2) and the traditional understanding of joinder generally. See Clifford S. Fishman & Ann T. McKenna, Jones on Evidence: Civil and Criminal § 17:17 (7th ed. Supp. 2016) ("Separate crimes committed with a similar, unusual modus operandi, or with sufficient similar characteristics, also may be joined for trial.").

Under this framework, this Court concludes that the offenses committed against both E.D. and L.S. are both connected together *and* part of a common scheme.

1. The Offenses committed against E.D. and L.S. are connected together, making joinder appropriate.

As recognized above, offenses are "connected together" when evidence of the offenses would be cross-admissible at separate trials. *Weber*, *supra*. Here, the offenses connected together because, similar to the *Shannon* case referenced in the *Farmer* analysis, the Defendant was the uncle of both girls. He used his position as a trusted family member to gain access to each girl (both in the same age range when the acts were perpetrated), and then, when left alone with the girls, used that relationship of trust to sexually assault or commit lewd acts with them, making various promises to each of them in an effort to secure their silence.

In addition, the Court concludes that the evidence of each would be admissible in the trial of the other, pursuant to NRS 48.045(2) to prove intent, motive, opportunity, plan, and lack of mistake or accident. It has long been recognized that, in sex offense cases, the courts

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have adopted "a more liberal judicial attitude . . . in admitting evidence of prior and subsequent proscribed sexual conduct." *McMichael v. State,* 94 Nev. 184, 577 P.2d 398, 1978 Nev. LEXIS 519 (Nev. 1978), *overruled, Meador v. State*, 101 Nev. 765, 711 P.2d 852, 1985 Nev. LEXIS 503 (Nev. 1985), *overruled, Braunstein v. State*, 118 Nev. 68, 40 P.3d 413, 118 Nev. Adv. Rep. 8, 2002 Nev. LEXIS 8 (Nev. 2002), *overruled in part as stated in, Bolin v. Baker*, 2015 U.S. Dist. LEXIS 18218 (D. Nev. Feb. 13, 2015).

For example, in *Findley v. State*[1], 94 Nev. 212, 577 P.2d 867, 1978 Nev. LEXIS 524 (Nev. 1978), *overruled, Braunstein v. State*, 118 Nev. 68, 40 P.3d 413, 118 Nev. Adv. Rep. 8, 2002 Nev. LEXIS 8 (Nev. 2002), *overruled in part as stated in, Bolin v. Baker*, 2015 U.S. Dist. LEXIS 18218 (D. Nev. Feb. 13, 2015), the Defendant was charged with lewdness with a child under the age of fourteen years, based on allegations that he had placed his hand upon the five-year-old victim's "private parts" on several occasions. The Defendant denied that this had occurred. During the State's case in chief, two adult women were permitted to testify, over objection, that the Defendant, some nine years earlier, had molested them in the same way. *Id.* On appeal, the Nevada Supreme Court approved of the District Court's decision to admit the testimony of the adult witnesses to prove intent, or the absence of mistake or accident, recognizing, in a sex crime case, intent, by reason of the words of the statute, is an element of the crime and directly placed in issue by the not guilty plea of the accused. *Id.*, *citing*, *Overton v. State*, 78 Nev. 198, 205, 370 P.2d 677 (1962). The Court went on to state that, although the other acts of molestation were remote in point of time, and may for that reason impeach credibility to some degree, they remained admissible. *Id.*, *citing*, *Bails v. State*, 92 Nev. 95, 545 P.2d 1155 (1976); *Bishop v. State*, 92 Nev. 510, 554 P.2d 266 (1976).

As to the use of the other acts testimony to prove motive, the Nevada Supreme Court has previously held that the probative value of explaining to the jury what motivates an adult man who is in a position to care for and protect a family member, to instead repeatedly sexually abuse that family member is very high. *Ledbetter v. State*, 122 Nev. 252, 129 P.3d 671, 122 Nev. Adv. Rep. 22, 2006 Nev. LEXIS 26 (Nev. 2006). In *Ledbetter*, the Court found

[1] Although both *McMichael* and *Findley* have been overruled on other grounds, they are not overruled on the matters for which they are cited in this order.

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that evidence of the defendant's prior acts of sexual abuse of other young victims showed his sexual attraction to, and obsession with, the young female members of his family, which explained to the jury his motive to sexually assault the victim. *Id.*

The propriety of the use of this type of evidence to prove motive was recently confirmed in *Stone v. State*, 2016 Nev. App. LEXIS 203 (Nev. Ct. App. May 17, 2016), where the Court again recognized, in a prosecution for sexual assault against a child under the age of 14 years, the district court did not abuse its discretion by admitting the prior bad act testimony of three witnesses that defendant had previously sexually assaulted them. The evidence of the prior acts was highly probative and explained to the jury defendant's motive to sexually assault the victim.

Likewise, in this case, although there is approximately a two year gap in the two allegations, the testimony of L.S. would be admissible in E.D.'s trial, and vice versa, to rebut the defense's denial that the acts occurred. It would further be admissible to prove intent, as set forth in the *Findlay* case. Most significantly, and squarely in line with *Ledbetter* and *Stone*, it would be admissible to prove motive – sexual attraction to, and obsession with, the young female members of his family. Because the evidence of the separate offenses would be cross-admissible in separate trials, under *Weber*, these offense are connected together joinder is appropriate. Based upon all of the applicable statutory and case authority, joinder is appropriate under NRS 173.115(2).

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2. Joinder is Appropriate Because the Separate Acts Reflect a Common Scheme.

The acts perpetrated by the Defendant also constitute a common scheme. As noted in *Farmer*:

> When determining whether a common scheme exists, courts ask whether the offenses share such a concurrence of common features as to support the inference that they were committed pursuant to a common design. State v. Lough, 125 Wn.2d 847, 889 P.2d 487, 494 (Wash. 1995). Features that this court has deemed relevant to this analysis include (1) degree of similarity of offenses, *Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003); (2) degree of similarity of victims, *id.* at 303, 72 P.3d at 590; (3) temporal proximity, *Mitchell*, 105 Nev. at 738, 782 P.2d at 1342; (4) physical proximity, *Griego*, 111

> Nev. at 449, 893 P.2d at 999; (5) number of victims, *id.*; and (6) other context-specific features. No one fact is dispositive, and each may be assessed different weight depending on the circumstances. *Weber*, 121 Nev. at 572, 119 P.3d at 119 ("Determining whether a common scheme or plan existed in this, or any, case requires fact-specific analysis.").

Id. at 121.

Here, the Court concludes that the offenses were similar in nature, involving inappropriate sexual conduct with two vulnerable minor children. The children are sisters and, as such, are very similar victims. The acts were not committed exceptionally close in time; however, the time gap led to the assaults occurring when the victims were in a similar age range (6 and 9 years old). The victims are further connected in that they are the Defendant's nieces. The Defendant used his status as a trusted family member to gain access to each of the children, and after obtained access, preyed upon these young, vulnerable victims. The fact-specific analysis in this case demonstrates that a common scheme existed in the Defendant's sexual misconduct with the victims and, as such, joinder is appropriate.

B. JOINDER IS NOT UNFAIRLY PREJUDICIAL TO THE DEFENDANT, BUT SEVERANCE WOULD BE PREJUDICIAL TO THE STATE IN THIS CASE.

The Defendant argues in his Motion that, even if joinder is legally appropriate, it would be unfairly prejudicial to the Defendant because, necessarily, the jury would convicted based upon a determination of propensity just because two victims testified. The court finds no factual or legal support for this proposition. To the contrary, virtually the same argument was made in the *Farmer* case, *supra*, unsuccessfully.

The *Farmer* Court, in addressing the argument that it was unfairly prejudicial to join the counts related to separate victims, found that the state was permitted to, and did properly, argue that the number of victims and the similarity of their stories was evidence that the offenses occurred as the victims claims, citing the "doctrine of chances" which provides that sexual molestation charges involving separate victims may be cross-admissible where the defense is the accusations are false or the victims mistaken. *Id.* The Court went on to state that such an argument was not an impermissible attack on Farmer's character nor did it unfairly invite the jury to make improper character inferences. *Id.* The Court recognized,

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contrary to the Defendant's assertions here, that jurors are capable of carefully considering the elements of each offense under the circumstances. *Id.*

On the other hand, the cost to the State of trying this case twice is significant. Two jury trials will have to be held, at significant expense to the taxpayers, to examine the same witnesses and present the same evidence. Furthermore, the prejudice to the victims and their families cannot be ignored. The entire family will have to re-live these events at not one, but two, separate jury trials. There is no basis to impose this burden on this family, where the courts recognize that a jury will be fully capable of considering the elements of each offense related to each victim. The Court concludes that a joint trial is not unfairly prejudicial to the Defendant, but would be prejudicial to the State.

Based upon the Findings of Fact and Conclusions of Law set forth above, now therefore,

ORDER

IT IS HEREBY ORDERED that the Motion to Sever Count V from Counts I-IV is DENIED.

DATED this 29 day of October, 2018.

JAMES E. WILSON, JR.
DISTRICT JUDGE

Office of the D Attorney
Carson Cit vada
885 East Musser St., Suite 2030, Carson City, Nevada 89701
Tel.: (775) 887-2072 Fax: (775) 887-2129

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The First Judicial District Court of the State of Nevada, and I certify that on this 29 day of October, 2018, I deposited in the departmental box located in the clerk's office or messenger service or deposited for mailing at Carson City, Nevada a true and correct copy of the foregoing Order and addressed to the following:

- [x] District Attorney/Attorney General
- [x] Public Defender
- [ ] Robert Walker, Esq.
- [ ] Noel Waters, Esq.
- [ ] John Malone, Esq.
- [ ] _____
  _____
  _____

Judicial Assistant

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MAIL

JASON D. WOODBURY
DISTRICT ATTORNEY
Nevada Bar No. 6870
885 E. Musser Street, Suite 2030
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(775) 887-2072
Attorney for Plaintiff

REC'D & FILED
AUG 14 2020
Date
AUBREY ROWLATT
CLERK
By Deputy

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

Office of the District Attorney
Carson City, Nevada
885 East Musser St., Suite 2030, Carson City, Nevada 89701
Tel.: (775) 887-2072 Fax: (775) 887-2129

OPPOSITION TO DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER

COMES NOW, the Plaintiff, STATE OF NEVADA, by and through counsel, JASON D. WOODBURY, District Attorney and Melanie A. Brantingham, Deputy District Attorney in and for Carson City, State of Nevada, and hereby opposes the Motion for Qualified Protective Order filed by the Defendant, Joshua Douglas Counsil, by and through his attorney, William M. Murphy, Esq.

This opposition is made and based upon the accompanying points and authorities, all pleadings and papers on file herein, and the arguments of counsel to be made at any hearing the Court deems appropriate with respect to this matter.

DATED this 14th day of August, 2020.

JASON D. WOODBURY
District Attorney

By: _____
MELANIE A. BRANTINGHAM
Deputy District Attorney
Nevada Bar No. 9152

Office of the District Attorney
Carson City, Nevada
885 East Musser St., Suite 2030, Carson City, Nevada 89701
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MEMORANDUM OF POINTS AND AUTHORITIES

On July 2, 2017, E.D. (age 6) reported to her mother that the Defendant, Joshua Counsil, had touched her inappropriately. PHT 35, 41 (date of initial disclosure by E.D.). She told her mother that he sticks his hands down her pants and puts his fingers inside her "crotch". PHT 35-36. E.D. further disclosed that the Defendant had been sexually assaulting her since approximately May, 2015.

On July 4, 2017, Janee spoke with L.S., her 13 year old daughter, regarding the disclosures made to her by E.D. L.S.'s reaction was "he went after her too," and she was very angry. PHT 41. Janee asked L.S. what she meant by that statement. L.S. disclosed that the Defendant had been making "advances" towards her for as long as she could remember, and that he had asked her to perform fellatio on him numerous times. PHT 41-42.

On July 6, 2017, Janee Smith arrived at the Sheriff's Office, with L.S. and E.D., to report that the Defendant had sexually assaulted both L.S. and E.D. PHT 15. Deputy Justin Whitehead met with Janee and her daughter L.S. at that time. PHT 15-16. During the meeting, Janee gave an approximate date range for the sexual assault perpetrated on E.D. as May, 2015 through June 15, 2017.

Deputy Whitehead turned the investigation of this matter over to detectives. PHT 21. Detective Sal Acosta was assigned to investigate this case. PHT 94-95. Detective Acosta made arrangements for the children to go to the Child Advocacy Center ("CAC") in Wahoe County, Nevada, for forensic interviews. PHT 95. He also went to the CAC on the date of the interviews, and observed them in real time via audio and video conference. PHT 96. E.D. made numerous disclosures during her forensic interview.

The parties are aware that E.D. has subsequently received mental health treatment. The Defendant seeks a qualified protective order on the basis that defense counsel "has concerns about the statements of E.D. as it relates to competency, truthfulness and her mental stability." Motion for Qualified Protective Order at p. 2. Essentially, the Motion indicates defendant wants to engage in a fishing expedition through the private medical/mental health records of a young girl, to see if there is anything from which he can

raise a defense, based upon counsel's stated speculation about her mental stability or truthfulness. This should not be authorized by the Court.

Defendant does not provide any authorities in support of his request, and has failed to demonstrate any reason why highly confidential personal mental health records of the victim E.D. should be released. "[The] Ninth Circuit has recognized a constitutionally protected interest in avoiding disclosure of medical information." *U.S. v. W. R. Grace*, 401 F.Supp.2d 1093 (D. Mont., 2005) *citing Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004). This right is not absolute, and may be infringed, upon a proper showing of governmental interest. *Id.*

The State of Nevada has an interest in protecting the Due Process rights of Counsil. However, Counsil has not set forth a sufficient basis for disclosing the records in this case. Defense counsel states he has learned that E.D. has sought mental health treatment at a facility in Missouri and that, on that basis alone, he now calls her competency into question. Based upon information and belief, the facility is specifically designed to provide trauma therapy for child victims of sex crimes. Further, just because the victim has sought treatment for the trauma she has suffered does not mean that she is either incompetent or delusional. Defendant indicates he wishes to review these records in an effort to investigate E.D.'s truthfulness, essentially based upon his speculation that mental health treatment must equal incompetence or delusions, as opposed to what is more likely – that E.D. sought treatment to address the trauma caused by the Defendant in this case. These are very private, very personal mental health records of a vulnerable young girl, and they should not be invaded simply so defense counsel can engage in a fishing expedition as to their contents. There is nothing to suggest that the records will demonstrate that E.D. was anything other than truthful in this case. In fact, that State suspects that the records would corroborate the charges in this case.

One purpose of a qualified protective order is to direct health care providers to legally disclose protected health information under HIPAA. 45 CFR 164.512. However, a qualified protective order is only a protective measure designed to protect the confidentiality of medical

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records when there is sufficient basis for disclosure of those records. *Id.* at 164.512(e)(iii)(C)(2) (qualified protective order can only issue after Court resolution of objections on the part of the individual whose information is to be disclosed). Since Counsil cannot demonstrate any basis why the victim's privacy should be invaded any more than it must be by her participation in this case, this Court should deny Counsil's Motion.

In the alternative, due to the nature of Counsil's request, and the extremely sensitive nature of the records being sought, it is respectfully requested that the Court order any records so obtained to first be provided to the Court for *in camera* review. If there are any relevant records obtained thereby, the Court can certainly authorize their release to the parties; but, ordering an *in camera* review first may very well prevent embarrassing, confidential information from being disseminated to the very person accused of causing E.D. harm in the first instance.

DATED this 14th day of August, 2020.

JASON D. WOODBURY
District Attorney

By: _____
MELANIE A. BRANTINGHAM
Deputy District Attorney
Nevada Bar No. 9152

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Carson City District Attorney and that on this 14th day of August, 2020, I caused to be served a copy of the foregoing document, titled: **OPPOSITION TO DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER** by faxing and delivering via ~~Acme Messenger Service~~ said document addressed to:

PD pickup box

William M. Murphy Esq.
Nevada State Public Defender's Office
511 E. Robinson Street,Suite 1
Carson City, Nevada 89701
(775) 687-4993

Office of the District Attorney
Carson City, Nevada
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ATTORNEY FOR DEFENDANT

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BY

IN THE FIRST JUDICIAL DISTRICT COURT OF STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,
Plaintiff,

vs.

JOSHUA DOUGLAS COUNSIL,
Defendant.
_____/

Case No. 17 CR 00269 1B

Dept. No. II

REQUEST FOR SUBMISSION

The Defendant, JOSHUA DOUGLAS COUNSIL, by and through his attorneys, KARIN L. KREIZENBECK, Nevada State Public Defender, and WILLIAM MURPHY, Chief Trial Deputy Public Defender, respectfully requests that the DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER filed July 30, 2020, the State's OPPOSITION TO DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER filed August 14, 2020 and DEFENDANT'S REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR QUALIFIED PROTECTIVE ORDER filed August 21, 2020 be submitted to this Court for decision.

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DATED this 24th day of August, 2020.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM MURPHY
Chief Trial Deputy Public Defender

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing REQUEST FOR SUBMISSION by preparing for hand-delivery and/or by facsimile a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 24th day of August, 2020.

SIGNED: Dawn Whaley

wmr

REC'D & FILED
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AUBREY ROWATT
BY [signature] DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

-oOo-

THE STATE OF NEVADA,	**CASE NO. 17 CR 00269 1B**
Plaintiff,	**DEPT. 2**
v	**ORDER TO APPEAR**
JOSHUA DOUGLAS COUNSIL,	
Defendant.	

In June of 2020, Defendant submitted a Motion for Qualified Protective Order. The Plaintiff filed an opposition to Defendant's motion on August 14, 2020. Defendant filed a reply to the State's opposition on August 21, 2020. None of the filings detail whether any medical patient privileges do or do not apply. Good cause appearing,

THE COURT ORDERS,

The parties shall appear for a hearing regarding the Motion for Qualified Protective Order on **September 15, 2020 at 9:00 a.m.** in Department 2 of the First Judicial District Court, on the third floor of 885 E. Musser Street in Carson City, Nevada.

September 2, 2020.

James E. Wilson, Jr.
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on the 4 day of September 2020, I served a copy of this document by placing a true copy in an envelope addressed to:

William M. Murphy, Esq. Nevada State Public Defender 511 E. Robinson St., Ste. 1 Carson City, NV 89701	Melanie Brantingham, Esq. Carson City District Attorney 885 E. Musser St., Ste. 2030 Carson City, NV 89701

the envelope sealed and then deposited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.

Billie Shadron
Judicial Assistant

CASE NO. 17 CR 00269 1B

DEPT. NO. II

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

BEFORE THE HONORABLE DISTRICT COURT JUDGE, JAMES E. WILSON

THE STATE OF NEVADA,

Plaintiff,

v

JOSHUA DOUGLAS COUNSIL,

Defendant.

/

JAVS TRANSCRIPT OF PROCEEDINGS

HEARING

SEPTEMBER 15, 2020

Transcribed By: Kathy Jackson CSR
Nevada CCR #402
California CCR #10465

APPEARANCES

For the State: MELANIE BRANTINGHAM
Deputy District Attorney
Carson City, Nevada

For the Defendant: WILLIAM MURPHY
Public Defender
Carson City, Nevada 89423

SEPTEMBER 15, 2020, CARSON CITY, NEVADA

-oOo-

THE COURT: 17CR269, State versus Counsil. Ms. Brantingham is present for the State. Mr. Ricco for the division. Mr. Murphy is present for Mr. Counsil. Mr. Counsil is present.

This is the time set on a motion for a hearing regarding records. One of the things I wanted to ask about is neither side quoted the privilege statutes. Is there some reason that those don't apply?

MR. MURPHY: The privilege statute would not apply because the purpose of a qualified protective order is a Court ordered. A qualified protective is sometimes, well, I'm going to say is generally used in civil practice where you want to get the medical records of somebody. And in a civil context, if the parties can't agree to disclosure of medical records, then they go to the Court and the Court orders the qualified protective order with the safeguards it has -- it has in place.

We just don't send two people outside the parties after the case has been litigated, then you disclose the records. And what regulates HIPAA is CFR, let me see. I have it in my notes. Court's indulgence. 45CFR164.512 subsection, yeah, I do have a copy if the Court wants it.

THE COURT: No.

MR. MURPHY: Okay. And under subsection E, it does permit disclosures in response to a subpoena discovery request, other lawful process in response to an order of a Court or an administrative tribunal. So what it is is if the Court determines that a qualified protective order is appropriate, then that trumps the privilege.

THE COURT: Well, the privilege that I'm talking about are those under 49, psychologists, doctor, potentially social worker, victim's advocate. So the HIPAA release doesn't prevent disclosure. It just limits disclosure.

MR. MURPHY: Well, it sets forth guidelines on disclosure. So the Court order -- can I take my mask off? Thank you. Well, the Court order -- well, the person whom the order is for will -- the order was taking what records are to be released, and it provides safeguards for how those records should be handled.

They are not to be disseminated again outside the parties for the purpose of litigation. They are not to be -- after the litigation is concluded, then it will be destroyed. So it provides safeguards to make sure that that information does not fall into the wrong hands or is not used in a way that was not -- is not for the (audio static). There is the Court order so whoever that is directed against or directed

to has the confidence that this is a Court order. We can release the information that is in the order without violating HIPAA.

THE COURT: Ms. Brantingham?

MS. BRANTINGHAM: Your Honor, as to the privileges, my -- my kind of take on that is those statutory privileges apply more to the court proceedings, calling witnesses, presenting documents, having documents admitted in court proceedings.

I think HIPAA does protect the medical records. The qualified protected order is the vehicle for someone to seek access to those records outside of or around HIPAA, if you will, but for the reasons set forth in our motion, we don't believe there's a sufficient factual basis for the Court to issue a qualified protective order.

Specifically, looking at the reply that was filed by the defense, I, of course, don't have an opportunity to comment on that outside of hearing in court, but there are no specific facts stated in here to believe that anything the victim said was untrue, save and except for the allegation that she reported that there were fly larva in the sink at the time she was sexually assaulted.

And the allegation by the defense is that that was untrue because when the detective went to the residence,

he didn't find any fly or fly larva. I would point out that that visit to the residence occurred about two years after the sexual assault claims arose in this case.

The point in time that they were reported to law enforcement, there was a substantial amount of corroborating evidence found by the detective in the bathroom in terms of the layout, the colors, the general condition of the bathroom. So to say that, well, she must be lying because she said there was fly larva that the detective didn't find two years later, I think kind of flies in the face of common sense.

And while the defendant does have a right to investigate and pursue his theories of defense, he doesn't just have a right to go tromping through the protected medical information of who is now a ten-year-old little girl, who was six at the time she was sexually assaulted. And absent some detailed showing of relevant information contained in the medical records, this should be kept private.

We want this little girl to be able to deal with the trauma that's been inflicted upon her. We want her to be able to seek medical and psychological help and therapy and be able to do that in a safe manner, where she feels safe, where she feels confident in speaking to her physicians and

treating psychologists and those professionals who are there to help her without worry that somebody is going to just go tromping through her medical records.

There isn't anything that the defense can point to that they think they will specifically find in those medical records to challenge her veracity, make some claims about some family issues of sexual behavior, but those have nothing to do with the little girl in this case. And for all those reasons we set forth in the opposition, my argument today, we ask the Court deny the qualified protective order.

MR. MURPHY: And at this point are we arguing for the qualified protection order because I only addressed the Court's question about --

THE COURT: Hold on.

MR. MURPHY: -- the language and --

THE COURT: Hold on.

MR. MURPHY: Okay.

THE COURT: I have a question for Ms. Brantingham still. I guess I'm still not following and I'm imagining that maybe a psychologist would be one of the people that would be the records would be sought. From looking at NRS 49.209, it says a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication between the patient and the

patient psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family.

I'm not understanding why that wouldn't prevent a disclosure of the psychologist records without her consent or potentially a finding that constitutes in a new process requires it be disclosed.

But my concern is the reasons for these privileges is so that a patient can be completely open with their therapist and so I -- tell me why you think the privilege does not apply, Ms. Brantingham. It's not just --

MS. BRANTINGHAM: I think it does apply.

THE COURT: Okay.

MS. BRANTINGHAM: I think it does apply. But I think the qualified protection order is the vehicle by which the Court can say that there is some other overriding state or federal law that allows the Court to disclose the records. Again, I don't think that's been shown here but I think that is the proper argument.

THE COURT: Now, Mr. Murphy, what about her argument that there are no specific facts alleged?

MR. MURPHY: Yeah, I have to completely disagree with that. Based on our investigation and the investigation of law enforcement, one of the specific things and what we

want to make -- we have to be mindful of, we don't completely give away our defense in these motions. And one of the things that the State is well aware of is in the investigation of this case, the alleged, well, the smallest alleged victim stated that there were flies and -- fly eggs in the sink and this was during the forensic interview.

So the detective asked was did that ever happen and they said no. So it has nothing to do with two years later that it not being there. They inquired as to what -- is this an untruth statement? They said no. So what we have here is during the forensic interview, this child conveying delusions. This is a delusion. This is something imaginary.

And there is a -- there was a case or a study done where they took a bunch of I think they were kindergarten or preschool children that were in a daycare facility and over the course of time, they all were convinced that they had been molested by a clown. And this is just to show the suggestibility of minor children.

The fact that this child conveyed a delusionary or a -- an imaginary fact that was shown by or was found by the detective not to be true, you have to question the other statements that were made. Now, that's just one example that the State knows about. We have other examples that or we have other information based on our investigation that we're

not required to disclose because that's part of our Work Product Doctrine. However, when we try to find out why is the minor in this facility, the State is of the position that she's there receiving treatment because of sexual abuse. We spoke to -- well, our investigation has shown that that's a farce.

Now, when we step back and we look at the whole picture of this, what we have is somebody at the time being eight years old, who as a matter of law is not competent, making statements. Those statements we have shown in our motion, at least one of those statements is incorrect. It's delusional. It's an imaginary fabrication. The detective showed that was delusional because they asked the family is that true.

We also have other information that we're prepared to present at trial to show that this could not have happened at the time that is being alleged. So we need the records to show or for our expert to examine, to give us the insight to say, all right, this is why she's actually in the facility. There was a time when they experienced some other un-recalled psychological trauma that has nothing to do with this case. And there were physical manifestations of that trauma. Is this sexual assault allegation just a manifestation of that trauma?

We have information that shows that the family in, well, even though they have every right to do so in America but their sexual attitudes are somewhat unconventional. Is that something that a small child has perceived and taken to interpret it in a way that could lead to false allegations?

You know, these aren't frivolous things. These are real psychological and psychiatric considerations. People are a product of their environment. Is this something that the child from being around it has adopted for maybe to be accepted for whatever reason. I'm not a psychologist or psychiatrist or any medical professional, but that's why we need those records so the medical professional can analyze these things and we can protect Mr. Counsil's due process rights and put on a meaningful defense and hopefully avoid and the person being convicted of the charges for which he's being charged.

THE COURT: So that -- the fly eggs was put in your reply points and authorities. And so how did that -- what led to her making that statement?

MR. MURPHY: It was just during the forensic interview when they took her to the Reno, I forget what exactly it's called, Child Advocacy Center. And they sit the child down with an advocate and they have a question and

answer session, and that's where it came out, and this was supposed to be a session in order to get facts and determine whether the child knows the difference between a truth and lie, all those preliminary things, and that's where it came out.

And it was such a fantastic statement that the detective, when he was there, thought, well, is this for real? No. Maybe they live in a filthy house. Who knows.

THE COURT: What was going on right before she made this statement? Is this in the location where these acts allegedly occurred?

MR. MURPHY: No. This is in the -- this is a center in downtown Reno at the child Advocacy Center during the interview with --

THE COURT: Where the eggs are, where the flies and the eggs are.

MR. MURPHY: Pardon me?

THE COURT: Where the flies and the eggs are.

MR. MURPHY: The flies, she's claiming that the flies and the eggs were in the sink of the bathroom of her house.

THE COURT: The place where this occurred?

MR. MURPHY: Yes.

THE COURT: Okay.

MR. MURPHY: So when the detective followed up and asked, you know, is there anything to that because it was such a, quite frankly, unbelievable statement. It was confirmed that, no, nothing like that had ever been in the sink.

THE COURT: That was verified through her parents or somebody?

MR. MURPHY: They talked to, I think it was her parents that took her or I think it was verified through her parents. That her parents were living there at the time.

THE COURT: Ms. Brantingham?

MS. BRANTINGHAM: Speculations and guess and lack of factual evidence before the Court does not a fact make. She reported this condition in this sink to investigators. Detective asked somebody else if they had seen it and the answer was no. There could be any number of reasons for that. It doesn't make -- it doesn't make it a fact. It doesn't make it true. It doesn't make it false.

That's a very weak statement to hang your hat on to go digging through a ten-year-old girl's very private medical information. That the family may engage in unusual sexual practices also has nothing to do with the child victim in this case.

And the entirety of Mr. Murphy's argument was

based on speculation and guess. Well, we might find this. We might find that. We want to see this. We want to see if there's some other reason. That is exactly what these laws are designed to prevent is that kind of unfettered fishing expedition into this child's medical records. She sought treatment for trauma inflicted on her by the defendant. I verified that with her family. That's why she was there. She wasn't there for another reason.

And to -- to throw out all sorts of speculation and guess as to whether there might be something else there does not provide a proper legal or factual basis for this Court to issue a qualified protection order.

MR. MURPHY: And I have to in one sense partially agree with the prosecution that there was -- that when she made the claim there were flies and egg, fly eggs in the sink. And, no, well, why was that statement made? I don't have the training and experience or education to figure out why. I'm not a child psychologist or a psychiatrist. Why would somebody make that statement that was obviously wrong or obviously fabricated or obviously delusional and it was confirmed that that statement was not a correct statement or a factual statement.

And what I think is the most disturbing here that didn't raise any alarm bells on the part of the

investigation -- investigation. When that popped up, that should have set off alarm bells and said, okay, there's something going on here and we need to dig a little further.

So if my personal, maybe I'm an idealist. If I was the State in this case, I would want these records for a double sided reason. One, if the records say what the State is claiming that they say that the person is in there because they are receiving treatment for sexual trauma, then the records will reflect that, and it will bolster their case.

Option number two is as the State with their awesome power to put people in jail for life is if there is -- it is questionable. And the person is being wrongfully prosecuted, then the State has a responsibility to keep that from happening.

So I can't think of any reason why the State would oppose the release of these records. We're not going to publish in the record or only going present it to our expert who will give us a layman's explanation as to why these things are what they are.

The State also is making argument that we're fishing. It's not fishing. We have a basis for it. It's just not -- well, it's over there. Let's see what's over there. We have a reason for it. But we don't have access to the detectives. We don't have access to the victim. We

don't have access to their -- most of their family members. So we have to figure out where there are problems and explore those problems in order to protect Mr. Counsil's due process rights and give him a meaningful defense.

We have outlined some of the problems that we -- we've identified some of the problems and presented those to the Court to show that we're not on what we're calling a fishing expedition. These are real problems that we have identified that have a basis for concern and that was why we need these records. Otherwise, we have no ability to determine whether the child is even competent or whether the claims she's making is based on imagination or delusion, which she's already made imaginary and delusional comments before. We have to have this in order protect Mr. Counsil to have a fair trial.

THE COURT: Did the child testify at the preliminary hearing?

MR. MURPHY: The child did not. We did do a pretrial writ based on the statute allowing hearsay. However, that writ was denied at the Supreme Court or I'm sorry, the Court of Appeals.

THE COURT: Ms. Brantingham, I'm going to have you prepare the order. I'm denying the request without prejudice at this time. There were huge specific facts

alleged. In fact, I don't think in the motion there were any facts of specific facts alleged in the reply. There were few specific facts and it did not contain it being the reply. It did not contain context like when, where, those things. Also neither the motion nor the reply included any law on the issue other than the citation to the HIPAA regulation.

The motion is denied on those grounds. I'm going to appoint an attorney to represent the child on the issue of privilege. And that will be the order of the Court at this point.

MR. MURPHY: So based on the new district court rules, when you say without prejudice, am I allowed to supplement or submit another order to address the concerns that the Court has because I'm not allowed to ask for reconsideration unless I think you made a mistake of law and I think I can, you know, make an argument based on mistake of law. But I want to know exact -- I just don't want to submit a motion for reconsideration and the Court automatically deny it based on the new district court rules or does the Court want me to file a second request for a qualified protective order?

THE COURT: I'm going to authorize that you file a supplement to the motion and you provide a file.

MR. MURPHY: Okay.

THE COURT: Ms. Brantingham is going to have an opportunity to respond to your supplement, and you're going to be able to file a reply to her response to your supplement.

MR. MURPHY: Okay.

THE COURT: All right, thank you.

MR. MURPHY: Oh, one last thing, is I did have a conversation with Mr. Counsil based on the Court's concerns about COVID and having jury trials. Apparently, Mr. Counsil was set for November. I have had a conversation with him, and he is prepared to reset that date. So if the Court is -- if it please the Court, we are prepared to vacate the November trial date and reset it for March 1st through March 12th.

THE COURT: Did you want me -- are you asking me to change it? I just want to make sure I'm understanding. Are you asking me to change the date from November to March?

MR. MURPHY: Yes.

THE COURT: Ms. Brantingham?

MS. BRANTINGHAM: That will be all right. I don't object to that.

THE COURT: And the dates in March were?

MR. MURPHY: March 1st through March 12th excluding Tuesdays.

THE COURT: There is already set the Candelario case.

MR. MURPHY: That's correct. He's out of custody.

THE COURT: Correct.

MR. MURPHY: And Mr. Odgers from our office is handling that.

THE COURT: Hold on. Let me finish my thought.

MR. MURPHY: I'm sorry.

THE COURT: Which there's already been a trial on. There was a hung jury in that case, and it seems to me very likely to go. But it is -- he is, Mr. Candelario is out of custody. Now, we've got that case set from the 1st through the 17th, with some days not having trial. Are eight days the week of March 1st and the week of March 8th, is that enough time, Ms. Brantingham, to try the case?

MS. BRANTINGHAM: Yes, I believe it is.

THE COURT: Mr. Murphy?

MR. MURPHY: I think so. That is one of the reasons why I chose that date because he is out of custody and because we do have that time slot available.

THE COURT: I just want to comment for the record that I'm not sure that we could not do this trial in November.

MR. MURPHY: Well, I don't know if we can or not because now that we're having this issue as to whether to get the medical records or not, even if the Court granted the order today, is we would have to get the funding for the expert. We already have an expert lined up. But now that there's -- we were experiencing delay getting the medical records, then I don't know that our expert is going to be prepared to brief us and be able to present testimony in November. I don't think a month is going to be enough time.

THE COURT: All right. The November trial date, Mr. Counsil, you're on board with this and continuing the November trial until March?

THE DEFENDANT: Yes Your Honor.

THE COURT: The November trial is vacated. This trial will be set for March 1st, 3rd, 4th, 5th, 8th, 10th, 11th and 12th. All of those are -- all of the dates associated with the November trial date are vacated.

MS. BRANTINGHAM: Your Honor, do you have a specific attorney will be appointed to represent the child on the privilege issue?

THE COURT: I don't.

MS. BRANTINGHAM: Can we just leave a blank in the order then and the Court can fill it in?

THE COURT: You can just indicate that I'm going

to appoint the attorney because it will be a totally separate order that appoints the attorney.

MS. BRANTINGHAM: Okay, thank you.

THE COURT: I need to think -- we have a list of people but not for this kind of an issue. So just indicate that I'm going to appoint an attorney.

MS. BRANTINGHAM: Okay.

THE COURT: All right, thank you.

MR. MURPHY: You know, now that I'm thinking of it, will the Court allow me to submit an ex parte supplement for in-camera review that only the Court can see because this is my problem, is I always have to be mindful of not giving away our defense in motions.

Would the Court be willing to review something in-camera or ex parte where I can outline more of my defense strategy and more of the information that I have acquired to support this order for a qualified protective order?

THE COURT: Yes.

MR. MURPHY: Thank you. I think that would be much more beneficial for the Court.

MS. BRANTINGHAM: And for the record, Your Honor, I would object to that because that gives the State no opportunity to rebut any allegations that come before the Court. I think this is one of those situations where

Mr. Murphy has some decisions to make. There comes a point where you have to decide if revealing some of your defense strategy is worth it to seek the records that you want, but you have to give the State a fair opportunity to respond.

MR. MURPHY: And to --

THE COURT: Hold on. Hold on.

So I appreciate the tension between my receiving ex parte communication and the State not having an opportunity to respond to that, at least at this point. But in my mind, Mr. Counsil's constitutional right to due process and not having to disclose his defenses outweigh the lack of opportunity of the State to respond to that. So at this point you can do it.

MR. MURPHY: Thank you, Your Honor.

THE COURT: Include that in that order as well, Ms. Brantingham.

MS. BRANTINGHAM: I will.

THE COURT: Thank you.

MR. MURPHY: All right. Thank you.

STATE OF NEVADA,)
)
CARSON CITY.)

I, KATHY JACKSON, do hereby certify:

That a motion hearing was held in the within-entitled matter in Carson City, Nevada;

That said motion hearing was recorded by a recording system, and said recording was delivered to me for transcription;

That the foregoing transcript, consisting of pages 1 through 23 is a full, true and correct transcript of said recording performed to the best of my ability.

Dated at Carson City, Nevada, this 17th day of February, 2023.

Kathy Jackson

KATHY JACKSON, CCR

REC'D & FILED

2020 SEP 17 AM 10: 19

AUBREY ROWLATT
CLERK

BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,	**Case No. 17 CR 00269 1B**
Plaintiff,	**Dept. No. II**
vs.	**ORDER APPOINTING ATTORNEY FOR E.D.**
JOSHUA DOUGLAS COUNSIL,	**DOB: 08/29/2010**
Defendant.	

IT IS HEREBY ORDERED:

Kyle Winter, Esquire is appointed attorney for **E.D. (DOB 8/29/2010)**, in this matter. The scope of the appointment is to ensure E.D.'s rights, including any applicable privileges, are protected in relation to the Defendant's Motion for Qualified Protective Order.

Attached to this copy of this order is a copy of the Defendant's motion, the State's opposition, and Defendant's reply. These records are to be kept confidential and not disclosed to any person without an order authorizing disclosure.

The parties are to cooperate with **Kyle Winter** and to provide any and all information required in a timely manner.

Kyle Winter shall file a response of child to Motion for Discovery of Medical Records by **October 30, 2020** and serve the parties.

September 17, 2020.

James E. Wilson Jr.
District Court Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on the 17 day of September 2020 I served a copy of this document by placing a true copy in an envelope addressed to:

Melanie Brantingham
Deputy District Attorney
885 E. Musser St., Ste. 2030
Carson City, NV 89701
(via office bin)

William M. Murphy, Esq.
Nevada State Public Defender
511 E. Robinson St., Ste. 1
Carson City, NV 89701
(via office bin)

Kyle Winter, Esquire
Allison MacKenzie, LTD.
402 N. Division Street
Carson City, NV 89703

the envelope sealed and then deposited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.

Billie Shadron
Judicial Assistant

THIS SEALED DOCUMENT,

NUMBERED PAGES

320-327

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MAIL

THIS SEALED DOCUMENT,

NUMBERED PAGES

328-344

WILL FOLLOW VIA U.S.

MAIL

NEVADA STATE PUBLIC DEFENDER
WILLIAM M. MURPHY, ESQ.
Nevada State Bar No. : 11424
511 E. Robinson St., Ste 1
Carson City, NV 89701
Ph: (775) 684-1080 / Fax: (775) 687-4993
Email: wmmurphy@nspd.nv.gov
Attorney for Defendant

RECD & FILED
2021 MAY 20 PM 1:30
AUDREY ROWLATT
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No.: 17 CR 00269 1B

JOSHUA DOUGLAS COUNSIL,

Dept. No.: II

Defendant.

/

MOTION TO DISQUALIFY CARSON CITY DISTRICT ATTORNEY'S OFFICE

The Defendant, JOSHUA DOUGLAS COUNSIL, by and through his attorneys, KARIN L. KREIZENBECK, Nevada State Public Defender, and WILLIAM MURPHY, Chief Trial Deputy Nevada State Public Defender, moves this Court for an Order disqualifying the Carson City District Attorney's Office.

This motion is made and based upon all papers and pleadings on file, as well as the attached Points and Authorities and Affidavit of Counsel.

DATED this 20th day of May, 2021.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM MURPHY
Chief Trial Deputy Public Defender

POINTS AND AUTHORITIES

Pursuant to the Second Amended Criminal Information filed by the State on August 24, 2018, the Defendant in this matter is charged with the following:

Count I: Sexual Assault/Sexual Assault against a Child under the Age of 14 Years, a category A felony as defined by NRS 200.366(1) and (3);

Count II: Sexual Assault against a Child under the Age of 14 years, a category A felony as defined by NRS 200.366(1) and (3);

Count III: Sexual Assault against a Child under the Age of 14 years, a category A felony as defined by NRS 200.366(1) and (3);

Count IV: Lewdness with a Child under 14 years of age, a category A felony as defined by NRS 201.230;

Count V: Attempted Lewdness with a Child under 14 years of age, a category B felony as defined by NRS 201.230 and NRS

On July 30,2020, the Defense filed a Motion For Qualified Protective Order in order to access the medical records of E.D. The State filed its opposition on August 14, 2020. The Defense filed a reply on August 24, 2020. The request to submit was also filed on August 24, 2020.

On September 2, 2020, the Court filed a Notice to Appear ordering a motion hearing on the Defendant's Motion for Qualified Protective Order. This hearing was scheduled for September 15, 2020. At this hearing, the court appointed an attorney to represent the alleged victim. E.D. The order appointing attorney for E.D. was filed on September 17, 2020.

On November 16, 2020, the defense filed an Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal to hire Marc Chambers, Ph.D. One of the purposes of wishing to retain Dr. Chambers was to provide guidance to the defense and the Court as to why the medical records of E.D. were necessary to the defense. In the Ex Parte Motion, the defense included an excerpt from the email between defense counsel and Dr. Chambers. This excerpt explained the concerns Dr. Chambers had regarding what he knew about the case, what Dr. Chambers would be looking for in medical records, and how these records were important to the defense.

On November 23, 2020, the Court filed a Notice to Appear for Motion Hearing to address the Defendant's November 16, 2020 Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal. The motion hearing was scheduled for November 24, 2020.

At the November 24, 2020 motion hearing, the District Attorney's office as well as the attorney appointed for E.D. were present. Counsel for the Defendant made several requests to hold the hearing outside the presence of the other parties, as counsel wanted to be candid to the Court concerning the Motion without divulging trial strategies and the thoughts and concerns of the defense. The request was originally denied and counsel for the Defendant responded to the Court's inquiries as honestly and candidly as possibly, but with ambiguity in the interest of not divulging the thoughts and concerns of the defense. Eventually, the Court ordered the other parties to vacate the courtroom, at which time counsel was able to be completely forthright with the Court concerning the need for the expert because the other parties were not present to hear the thoughts and strategies of the defense.

Subsequent to the November 24, 2020 hearing, counsel for the defense learned the District Attorney's office and the attorney for E.D. were provided the November 16, 2020 Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal. This is the Motion provided to the Court that included the correspondence between defense counsel and its proposed expert, Dr. Marc Chambers, as well as the candid thoughts and impressions of the defense concerning the case and the need for the expert. The District Attorney's Office and the attorney for E.D. were provided this Motion via email from the First Judicial District Court, Department II, on November 23, 2020.

The due process clause of the Fifth Amendment of the United States Constitution, applicable to the state through the Fourteenth Amendment as well as the Due Process Clause of the Fourteenth Amendment provides in pertinent part, "...nor be deprived of life, liberty, or property, without due process of law." Additionally, The Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, guarantees the accused shall have the Assistance of Counsel for his defense.

NRS 174.245(2) states:

> The prosecuting attorney is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
>
> (a) An internal report, document or memorandum that is prepared by or on behalf of the defendant or the defendant's attorney in connection with the investigation or defense of the case.
>
> (b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

Here, the Defense filed an Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal. Ex parte motions are authorized by FJDCR rule 1.9. The ex parte communication is permitted for this Motion because the defense was seeking funds to hire an expert and may reasonably result in the prosecution gaining an advantage if the prosecution knew the defense was seeking to retain an expert. Requesting the document be filed under seal is permitted by FJDCR rule 3.5. even though the rule states the Motion will be filed under seal without a court order, the defense expressly include "under seal" as a protective redundancy to prevent dissemination to anyone other than the Court.

The defense asserts the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal is protected by statute in that it was a document prepared on behalf of the defendant's attorney in connection with the defense of the case. The defense submitted the Ex Parte Motion for Extraordinary Funds At State Expense Filed Under Seal as the Nevada State Public Defender's Office does not have funds to hire and expert and all requests for monies must be submitted to the Court for approval. The District Attorney's office was not entitled to this Motion pursuant to statute.

In order to properly justify the motion for funds, defense counsel was candid and forthright with the Court, divulging the privileged communication between the defense and Dr. Chambers as well as divulging trial strategy and the thought process of the defense team.[1]

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[1] The defense intentionally does not discuss the information divulged in the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal as this motion is available to the public and divulging the information here could be considered a waiver.

The purpose and expectation of the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal was to prevent the prosecution and other parties from knowing the contents of the Motion, the intentions of the defense in seeking an expert, the correspondence between defense counsel and its proposed expert, as well as the thoughts and impressions of the defense to justify granting the Motion. Needless to say, if the Defendant was a person of means for whom counsel would not need the approval of the Court for funds, the defense team would have been able to hire Dr. Chambers without Court approval, and the prosecution would never have been privy to the Defense's intentions to hire an expert, the privileged communications between defense counsel and Dr. Chambers nor the thoughts and impressions of defense counsel.

The standard for evaluating whether a prosecutor's office should be disqualified is discussed in State v. Eighth Judicial Dist. Court of the State, 130 Nev. 158, 164-65, 321 P.3d 882, 886 (2014). This case sets forth the standard that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial.

Here, the Defendant can no longer receive a fair trial because the prosecution now knows what the defense is exploring through its expert and what the expert will be looking for in the discovery as well as any medical reports. Now that the prosecution knows what the defense is looking for, if those defenses or issues are not presented, the prosecution will undoubtedly exploit the absence of those issues at trial and during cross-examination. The prosecution now knows exactly what issues to explore because it has the email the expert sent to defense counsel setting forth exactly the issues the expert will be exploring. There is no way the Defendant can get a fair trial if the Defendant is required to divulge the confidential communications between counsel and experts which the prosecution can later use in its prosecution.

Additionally, counsel disclosed to the Court its defense concerning the State's investigation of this case in the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal. The prosecution now knows of this defense strategy and the theory behind this strategy, which it never would have known but for the prosecution being privy to the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal. The prosecution is now privy

to the thoughts of counsel as it relates to this defense. Again, the Defendant cannot receive a fair trial now that the prosecution knows so much of the defense strategy.

The prosecution will be seeking to persuade twelve jurors the Defendant committed the crimes for which he is accused with no physical evidence. The prosecution's knowledge of the trial strategies, theories, communication with the expert and how they will be implemented for the defense prevents the Defendant from receiving a fair trial.

As the United States Supreme Court stated in United States v. Nobles, 422 U.S. 225, 95 S. Ct. 2160 (1975):

> The work-product doctrine, recognized by this Court in *Hickman* v. *Taylor,* 329 U.S. 495 (1947), reflects the strong "public policy underlying the orderly prosecution and defense of legal claims." *Id.,* at 510; see also *id.,* at 514-515 (Jackson, J., concurring). As the Court there observed:
> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their 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 strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case 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 the clients and the cause of justice would be poorly served." *Id.,* at 510-511.I
>
> The Court therefore recognized a qualified privilege for certain materials prepared by an attorney "acting for his client in anticipation of litigation." *Id.,* at 508. See generally 4 J. Moore, Federal Practice p26.63 (2d ed. 1974); E. Cleary, McCormick on Evidence 204-209 (2d ed. 1972); Note, Developments in the Law -- Discovery, 74 Harv. L. Rev. 940, 1027-1046 (1961).
>
> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the

> criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.
>
> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.
>
> United States v. Nobles, 422 U.S. 225, 236-39, 95 S. Ct. 2160, 2169-70 (1975)

The only way to ensure the Defendant receives a fair trial is to disqualify the entire Carson City District Attorney's Office. This will ensure there is no cross-contamination to other attorneys and will avoid a mistrial should any of the above-mentioned issues become an issue at trial.

The District Attorney's Office does know about the defendant's Motion because counsel was informed that the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal was sent to the District Attorney's Office.

Defense was asking for funds to assist the defense in its Motion. The defense did not have access to an expert and was compelled to request funds from the court. The court could have requested a hearing outside the presence of opposing parties and the public if it needed additional information prior to granting or denying the defendant's Motion. Providing the Motion to opposing parties did not assist the Court in making this determination.

The Nevada Supreme Court in State v. Eighth Judicial Dist. Court of the State, 130 Nev. 158, 163, 321 P.3d 882, 885 (2014) cited to three jurisdictions in which the fair trial standard is applied. The three jurisdictions which follow the standard that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial. These jurisdictions are Colorado, Kansas and California.

A. The Colorado Fair Trial approach.

Colorado had codified the circumstances in which the office of the district attorney may be disqualified. These circumstances are: (1) at the request of the district attorney; (2) upon a showing that the district attorney has a personal or financial interest in the prosecution, or (3) the court finds special circumstances that would render it unlikely the defendant would receive a fair trial. People v. Kendrick, 396 P.3d 1124, 1130 (Colo. 2017).

The Colorado Supreme Court has provided rationale on several cases in the analysis as to whether a defendant would receive a fair trial. The Court in People v. Perez, 201 P.3d 1220 (Colo. 2009), held there was not a basis to disqualify the entire district attorney's office because no confidential information was passed or could be passed to other members of the district attorney's office. see also *see also* *People v. Manzanares*, 139 P.3d 655, 659 (Colo. 2007) (stating that the inquiry is "whether confidential information has been and can continue to be screened from those members of the District Attorney's Office who would actually prosecute defendant's case"). The crux of the rationale and similar cases is the possession of confidential information. In People v. Chavez, 139 P.3d 649 (Colo. 2006) the Court upheld the disqualification of the assistant district attorney because the assistant district attorney possessed confidential information from when the assistant district attorney was in private practice. The Court remanded to the trial court to consider whether the entire district attorney's office should be disqualified based on whether the district attorney's office screening policy will prevent special circumstances that might lead to an unfair trial.

B. The Kansas Fair Trial Approach.

The Supreme Court of Kansas in State v. Miller, 427 P.3d 907 (Kan. 2018) upheld the disqualification of an assistant district attorney when the assistant district attorney came into possession of information protected by the attorney-client privilege. The Court upheld the district court holding that the assistant district attorney be disqualified, but the entire district attorney's office did not need to be disqualified because the district attorney's office had sufficient

safeguards in place to assure the ADA's living arrangement with a State's witness, who had already testified at trial, would not prejudice the defendant's second trial.

In State v. Pledger, 440 P.3d 625 (Kan. Ct. App. 2019) the Court held the defendant did not disclose any confidential information to the special prosecutor when the defendant consulted with the special prosecutor about potential representation. There was, therefore, no confidential information the special prosecutor could use against the defendant in court.

As in the Colorado analysis, the crux is whether confidential information is possessed by the district attorney's office.

C. The California Fair Trial Approach.

Section 1424 of the California Penal Code states that a motion to recuse "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." Cal. Penal Code § 1424

In the Court of Appeal of California, Fifth Appellate District, People v. Evaro, No. F053982, 2008 Cal. App. Unpub. LEXIS 10534 (Dec. 30, 2008),[2] the defense hired an expert who was later retained by the prosecution. the court upheld the trial court's finding to disqualify the expert. The court of appeals found any attorney in the district attorney's office who was privy to the expert's work or theories was disqualified, but such disqualification did not apply to the entire district attorney's office as isolation from disqualified persons may avoid exposure to confidential information.

In *Love v. Superior Court* 168 Cal. Rptr. 577, (Cal Ct. App 1980). a conflict was found when a deputy district attorney within the "very section" responsible for prosecuting the defendant had previously served as legal research assistant working on the defense in the case

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[2] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

People v. Evaro, No. F053982, 2008 Cal. App. Unpub. LEXIS 10534, at *1 (Dec. 30, 2008)

against the defendant. The Court observed that as a legal research assistant, the deputy district attorney, "was privy to confidential information vital to the defense."

In Morrow v. Superior Court, 36 Cal. Rptr. 2d 210 (Cal. Ct. App 1994), the prosecutor engaged in eavesdropping upon a privileged attorney-client communication and acquired confidential information. The Court found dismissal of the charge was appropriate remedy as such behavior shocked the court's conscience.

In the present case, even though the defense does not assert or imply any wrongdoing on the part of the Carson City District Attorney's Office, this case demonstrates the importance of the defendant's right to a fair trial when the prosecution has acquired confidential information.

All the above cases turn on the acquisition of confidential information. Most of the cases held disqualification of the entire district attorney's office was not necessary because the district attorney's office had safeguards in place that would ensure no confidential information would be disseminated to the attorney prosecuting the case. In this case, however, the Carson City District Attorney's Office is a small, intimate office with seven criminal attorneys. It is highly unlikely the Carson City District Attorney's screening can or will resolve the dissemination of the confidential communications.

An argument exists that disqualification of an entire district attorney's office is an extreme measure that should only be ordered when the confidential information cannot be properly screened from other attorneys. As discussed above, the ability to screen in such a small office is unrealistic.

Additionally, the burden of appointing a special prosecutor is a hardship on the district attorney's office. This may be true in larger offices such as Clark County, Washoe, Los Angeles, or other large district attorney's office. In this case, however, there are nearby neighboring counties which can assume prosecution as well as the Nevada Office of the Attorney General. There would not be a hardship in having a prosecutor appointed from one of these offices.

Considering the Defendant is charged with some of the most punitive crimes in violation of Nevada law, it is essential to ensure there is no possibility of violating the Defendant's right to

a fair trial and disqualifying the entire Carson City District Attorney's office is the proper course of action.

CONCLUSION

Based on the arguments presented above, it is respectfully requested this Court find the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal contained confidential communications protected by statute and case law. These confidential communications are now in the possession of the Carson City District Attorney's office. These communications contain the thoughts, impressions, and trial strategy of the defense. The Defense did not intend to have the confidential communications disseminated other than to the Court. The Defendant cannot receive a fair trial now the prosecution has this confidential information. Because of the small size of the office, simply disqualifying the Deputy District Attorney will not properly protect the Defendant's right to a fair trial. The entire Carson City's District Attorney's Office must be disqualified.

RESPECTFULLY SUBMITTED this 20th day of May, 2021.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM MURPHY
Chief Trial Deputy Public Defender

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing MOTION TO DISQUALIFY CARSON CITY DISTRICT ATTORNEY'S OFFICE by preparing for hand delivery and/or facsimile a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 20th day of May, 2021.

SIGNED: Dan W Hooley

JASON D. WOODBURY
DISTRICT ATTORNEY
Nevada Bar No. 6870
885 E. Musser Street, Suite 2030
Carson City, NV 89701
(775) 887-2072
Attorney for Plaintiff

REC'D & FILED
2021 JUL -6 PM 4:41
AUDREY ROWLATT
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

OPPOSITION TO MOTION TO DISQUALIFY DISTRICT ATTORNEY'S OFFICE

COMES NOW, the Plaintiff, STATE OF NEVADA, by and through counsel, JASON D. WOODBURY, District Attorney and Melanie A. Brantingham, Deputy District Attorney in and for Carson City, State of Nevada, and hereby opposes the Motion to Disqualify District Attorney's Office filed by the Defendant, JOSHUA DOUGLAS COUNSIL, by and through his counsel of record, William M. Murphy, Esq.

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Office of the District Attorney
Carson City, Nevada
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This opposition is made and based upon the accompanying points and authorities, all pleadings and papers on file herein, and the arguments of counsel at any hearing the Court deems appropriate with respect to this matter.

DATED this 6th day of July, 2021.

JASON D. WOODBURY
District Attorney

By: Melanie A. Brantingham
MELANIE A. BRANTINGHAM
Deputy District Attorney
Nevada Bar No. 9152

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

On November 23, 2020, counsel for the State received an email from the Court's Judicial Assistant indicating that the Court had asked her to set a Motion for Extraordinary Funds filed by the Defendant on the law and motion calendar. Kyle Winter, who had been appointed to represent the child whose medical records were at issue, responded that he could be available on November 24, 2020, but that he did not receive a copy of the Motion for Extraordinary Funds. A short time later, the Court's Judicial Assistant emailed the Motion to Mr. Winter and counsel for the State. Counsel for the State has no specific recollection of having read the Motion at that time and had no recollection of any specific defense strategies revealed therein.

It did not come as a surprise to counsel for the State that the Defendant was seeking to retain an expert witness; in fact, counsel believes that defense counsel had stated as much on prior occasions, and the unavailability of an expert to review the case has affected the trial dates. Furthermore, defense counsel revealed his strategy of challenging the credibility of the victims in this case from the very beginning, questioning the witnesses who testified at the preliminary hearing about what he believed to be false or exaggerated statements of the victim. And, finally, the strategy of challenging the victim's credibility was mentioned directly in the Motion for the Qualified Protection Order, which was served on the State by defense counsel.

In anticipation of filing this Opposition, counsel for the State skimmed through the Motion, for purposes of understanding the contents of the Motion to Disqualify the District Attorney's Office. Defense counsel includes the identity of his expert witness, his CV and an excerpt from an email received from his expert, wherein the expert

lists the types or categories of information he would be looking for in the records. No actual correspondence was attached, no opinions were rendered regarding the victim or her credibility, and there were no "candid thoughts or impressions" of note in the Motion. Nothing in the Motion came as a surprise to counsel for the State, and no confidential defense strategy was revealed therein.

As set forth below, the case authority does not support disqualifying the Carson City District Attorney's Office in this case, and the Motion should be denied.

II. ARGUMENT.

A. THERE IS NO RULE PROHIBITING THE COURT FROM DISCLOSING AN EX PARTE MOTION.

As an initial matter, FJDCR 1.9 does not authorize the filing of Ex Parte Motions, as stated in the Defendant's Motion. Ex Parte Motions are governed by Rule 3.19, which provides that ex parte motions can be filed in emergency situations. The State does not intend to suggest that it is always entitled to know when the defense is requesting funds for expert witnesses or submitting ex parte requests to the Court; however, just as the State acknowledges that ex parte motions are available to the defense to seek funds for expert witnesses, it likewise submits that there is nothing that prevents the Court from determining that the Motion should be shared with the opposing party (nor does the defendant include any such authority in his Motion.) On that basis, the Court acted properly when it disclosed the Motion, seeking input from the State and counsel for the minor child. Nothing about that disclosure provides a basis for disqualifying the Carson City District Attorney's Office.

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B. THERE IS NO LEGAL BASIS TO DISQUALIFY THE CARSON CITY DISTRICT ATTORNEY'S OFFICE.

An entire prosecutor's office may be disqualified only "in extreme cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action." . *Monroe v. State*, No. 58171, 2013 Nev. Unpub. LEXIS 1472, at *2-3 (Sep. 26, 2013), *citing Collier v. Legakes,* 98 Nev. 307, 310, 646 P.2d 1219, 1220-21 (1982). When considering a motion to disqualify a prosecutor's office, the district court should determine whether, under the totality of circumstances, "the prosecutorial function could be carried out impartially and without breach of any privileged communication." *Id.*

A significant majority of the cases discussing disqualifying a prosecutor or a prosecutor's office relate to situations wherein the prosecutor has some direct relationship with the Defendant or the case. For instance, in *Monroe*, the prosecutor had directly been threatened by the Defendant. Disqualification was not required in that instance. In *State v. Eighth Judicial District Court*, the Nevada Supreme Court considered whether the Clark County District Attorney's Office, as a whole, should be disqualified from prosecuting defendants the District Attorney had previously represented in his capacity as a defense attorney. The Court, in that case, found that the District Attorney, himself, was disqualified because he had received confidential information from the defendant while working in his former capacity. However, that conflict was not imputed to his entire office.

The types of circumstances that generally require disqualification of either the prosecutor or the entire district attorney's office simply do not exist in this case. The State has no confidential information from or regarding the Defendant. The State has

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no bias nor reason to be biased against the Defendant. As such, the prosecutorial function in this case can be carried out impartially and without breaching privileged communications.

It is clear from a brief review of the Motion for Extraordinary Funds that no specific information regarding the defense is contained therein. It is no surprise that the defense in this case turns on a challenge to the credibility of the victims' testimony – in fact defense counsel has stated, in open court, and to counsel for the State on many occasions that he believes the defense to the case is in challenging the victims' credibility; however, there are no specific attacks on that credibility contained within the Motion. Rather, it is a very generic request for expert witness funds to review medical records to see if any challenge to the victims' credibility can be made.

Furthermore, the areas of interest noted by the expert witness for reviewing the records are not specialized or proprietary in nature. The expert indicates he would look for signs of intellectual disability, mental health diagnoses or other conditions which might affect perception, memory or recall. These are *standard* areas for challenging witness testimony. There is nothing specific, unique or proprietary disclosed in the Defendant's Motion that would give the State any unfair advantage at trial. There is no analysis of the victim or her medical records, no particularized challenges to her competency, and no opinion rendered as to her credibility or competency, or lack thereof.

In addition, the State would note that the information contained in the Motion for Extraordinary Funds is significantly less than the information to which the prosecution would be entitled in the filing of an expert witness notice. Any such notice must contain a brief statement regarding the subject matter on which the

expert witness is expected to testify and the substance of the testimony, a copy of the curriculum vitae of the expert witness, and a copy of all reports made by or at the direction of the expert witness. NRS 174.234(2). Undoubtedly, the expert disclosure would contain information regarding the expert's actual opinions and the basis for them. There is also nothing prevents the State from contacting the expert directly and discussing the subject of his testimony with him. In fact, such inquiries are a standard, common practice in criminal prosecution.

While defense counsel may wish to hold his strategies "close to the vest" as a matter of preference, the fact that a known and already-disclosed strategy was disclosed in the Motion for Extraordinary Funds did not put any legally confidential information into the hands of the prosecution or give the prosecution any unfair advantage. There is no appearance of impropriety here, no extreme circumstance that undermines the confidence in the legal system, and no showing that the Defendant cannot receive a fair trial. The Motion told the State no more than it already knew. There is simply no legal justification or disqualifying the District Attorney in this case and, on that basis, the Motion should be denied.

DATED this 6th day of July, 2021.

JASON D. WOODBURY
District Attorney

By: Melanie A. Brantingham
MELANIE A. BRANTINGHAM
Deputy District Attorney
Nevada Bar No. 9152

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Carson City, Nevada
885 East Musser St., Suite 2030, Carson City, Nevada 89701
Tel.: (775) 887-2072 Fax: (775) 887-2129

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Carson City District Attorney and that on this 6th day of July, 2021, I caused to be served a copy of the foregoing document, titled: **OPPOSITION TO MOTION TO DISQUALIFY DISTRICT ATTORNEY'S OFFICE** by faxing and placing a copy of said document in the Public Defender's Box for pick-up, addressed to:

William M. Murphy Esq.
Nevada State Public Defender's Office
511 E. Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 687-4993



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Carson City, Nevada
885 East Musser St., Suite 2030, Carson City, Nevada 89701
Tel.: (775) 887-2072 Fax: (775) 887-2129

NEVADA STATE PUBLIC DEFENDER
WILLIAM M. MURPHY, ESQ.
Nevada State Bar No. : 11424
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Email: wmmurphy@nspd.nv.gov
Attorney for Defendant

FILED & FILED
2021 JUL 12 PM 4:12
AUBREY ROWLATT
CLERK
BY K. PETERSON
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No.: 17 CR 00269 1B

JOSHUA DOUGLAS COUNSIL,

Dept. No.: II

Defendant.

/

DEFENDANT'S REPLY TO STATE'S OPPOSITION TO MOTION TO DISQUALIFY CARSON CITY DISTRICT ATTORNEY'S OFFICE

The Defendant, JOSHUA DOUGLAS COUNSIL, by and through his attorneys, KARIN L. KREIZENBECK, Nevada State Public Defender, and WILLIAM MURPHY, Chief Trial Deputy Nevada State Public Defender, files this reply.

DATED this 9th day of July, 2021.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM MURPHY
Chief Trial Deputy Public Defender

POINTS AND AUTHORITIES

In Part A of the Carson City District Attorney's opposition, the Carson City District Attorney asserts there is nothing that prevents the Court from determining that the motion should be shared with the opposing party.[1]

The Court did not make a determination that the ex parte motion funds filed under seal should be shared with opposing party. No hearing was held. No briefing on the matter of dissemination was ordered. No order instructing such was filed. No discussion whatsoever was had prior to the prosecution being provided with the Defendant's ex parte motion filed under seal. As set forth in the Defendant's Motion to Disqualify the District Attorney's Office, the Nevada State Public Defender's Office does not have funds in which to hire experts. Pursuant to NRS 7.135 funds for experts must have prior approval in an ex parte application. Additionally, the Sixth Amendment right to effective assistance of counsel provides the authority for payment for experts. (Brown v. Eighth Judicial Dist. Court, 133 Nev. 916, 919, 415 P.3d 7, 10 (2017) citing Widdis v. Second Judicial Dist. Court, 114 Nev. 1224, 1228, 968 P.2d 1165, 1168 (1998).

Defense counsel followed the requirements of the statute in filing the ex parte motion for funds. The Carson City District Attorney provided no authority to support the position that ex parte motions filed pursuant to statute are subject to dissemination. Without digressing into a policy argument which is not the basis of this motion, the Court can easily recognize the negative implication of disseminating defense counsel's ex parte motion for experts to the prosecution.

In part B of the Carson City District Attorney's opposition, the Carson City District Attorney claims it does not have any confidential from or regarding the client. As discussed in the Defendant's motion to disqualify, the Carson City District Attorney has the Defendant's ex parte motion in which the privileged communication between defense counsel and defense counsel's expert were provided verbatim. The Defense also disclosed its thoughts and impression of the defense and defense strategy.

The Carson City District Attorney claims the defenses set forth in the Defendant's motion are no surprise. The Carson City District Attorney further states in its opposition that the

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[1] State's opposition page 2, line 18.

particular areas of interest (which the Carson City District Attorney learned from the ex parte motion and the privileged communication between counsel and expert) are "standard areas for challenging witness testimony." The Carson City District Attorney cannot assert the privileged information it acquired as a result of the privileged communication are harmless because they are "standard" or that the Carson City District Attorney is not surprised. The proper inquiry is whether it is unlikely the defendant will receive a fair trial. Interestingly, the Carson City District Attorney now takes the position that these are standard areas for challenging witness testimony and the Carson City District Attorney is not surprised by this defense in order to prevent being disqualified from the case when it previously accused the defense of "fishing" in its opposition to the release of medical records.

The Carson City District Attorney then uses the argument that defense counsel would be required to disclose significantly more information in the notice of expert notice. This argument lacks merit. The privileged information the Carson City District Attorney learned about the defense investigation and thoughts and impressions of the case are completely separate than the notice of expert witness as set forth in NRS 174.234. The notice of expert witness does not require the defense to disclose the internal investigation conducted by the defense; it does not require the defense to disclose trial strategy; it does not require the defense to disclose privileged communications between counsel and experts in preparation for trial; it does not require the defense to disclose its thoughts and impressions. This is the information that was disclosed in the Defendant's Ex parte motion.

The Carson City District Attorney concludes its opposition with the statement that the defendant made no showing he could not receive a fair trial because the ex parte motion contained information the Carson City District Attorney already knew. The Carson City District Attorney may have predicted, anticipated or not be surprised by the information provided in the defendant's ex parte motion, but the Carson City District Attorney did not actually know these things until it was laid out in a filed court document accompanied by defense counsel's affidavit in support of the motion.

The Carson City District Attorney can try to minimize the impact of being in possession of the defense's ex parte motion which basically sets forth the entire defense strategy and its investigative efforts. The Carson City District Attorney can try to salvage their role as prosecutor by calling the defense defenses "standard" defenses or not being surprised by the direction the defense is taking. The undeniable reality of the situation is the defendant is facing multiple category A felonies which carry multiple life sentences. The Carson City District Attorney now possesses the confidential communications of the defense as well as the thoughts and impressions of the defense. Since the Carson City District Attorney now possesses this information, irrespective of the weight they chose to attribute to this information, they now posses this information and this information contains the communications between counsel and its expert as well as trial strategy and the thoughts and impressions of the defense. this information can never be unlearned and knowing this information prevents the Defendant from receiving a fair trial.

CONCLUSION

It is respectfully requested this Court find the Ex Parte Motion for Extraordinary Funds at State Expense Filed Under Seal contained confidential communications protected by statute and case law. These confidential communications are now in the possession of the Carson City District Attorney's office. These communications contain the thoughts, impressions, and trial strategy of the defense. The Defense did not intend to have the confidential communications disseminated other than to the Court. The Defendant cannot receive a fair trial now the prosecution has this confidential information. Because of the small size of the office, simply disqualifying the Deputy District Attorney will not properly protect the Defendant's right to a fair trial. The entire Carson City's District Attorney's Office must be disqualified.

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM MURPHY
Chief Trial Deputy Public Defender

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing

DEFENDANT'S REPLY TO STATE'S OPPOSITION TO MOTION TO DISQUALIFY CARSON CITY DISTRICT ATTORNEY'S OFFICE

by preparing for hand delivery and/or facsimile a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 12 day of July, 2021.

SIGNED: Melissa Carlstrom

NEVADA STATE PUBLIC DEFENDER
WILLIAM M. MURPHY, ESQ.
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ATTORNEY FOR DEFENDANT

RECD & FILED
2021 JUL 13 PM 4:15
AUBREY ROWLATT
CLERK
BY
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,
Plaintiff,

vs.

JOSHUA DOUGLAS COUNSIL,
Defendant.
_____/

Case No. 17 CR 00269 1B

Dept. No. II

DEFENDANT'S REQUEST FOR SUBMISSION OF MOTION TO DISQUALIFY CARSON CITY DISTRICT ATTORNEY'S OFFICE

The Defendant, JOSHUA DOUGLAS COUNSIL, by and through his attorneys, KARIN L. KREIZENBECK, Nevada State Public Defender, and WILLIAM MURPHY, Chief Trial Deputy Public Defender, respectfully requests that the Defendant's Motion to Disqualify Carson City District Attorney's Office filed May 20, 2021; the State's Opposition, filed on July 6, 2021; and the Defendant's Reply, filed on July 12, 2021 be submitted to this Court for review and consideration.

DATED this 13 day of July, 2021

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM MURPHY
Chief Trial Deputy Public Defender

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing REQUEST FOR SUBMISSION by preparing for hand-delivery and/or by facsimile a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 13 day of July, 2021.

SIGNED: Melissa Carlson

REC'D & FILED
2021 AUG 25 PM 2:00
AUBREY ROWLATT
BY_____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

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THE STATE OF NEVADA,	**CASE NO. 17 CR 00269 1B**
Plaintiff,	**DEPT. 2**
vs	
JOSHUA DOUGLAS COUNSIL,	
Defendant.	

ORDER DENYING MOTION TO DISQUALIFY CARSON CITY DISTRICT ATTORNEY'S OFFICE

PROCEDURAL BACKGROUND

Before the Court is the defense motion to disqualify the Carson City District Attorney's Office (District Attorney's Office), the opposition and reply.

FACTS

The District Attorney's Office charged Joshua Counsil with three counts of sexual assault against a child under the age of 14, one count of lewdness with a child under the age of 14, and attempted lewdness with a child under the age of 14.

On July 30, 2020 the defense filed, under seal, a motion for a qualified protective order. In that motion the defense alleged the complainant in this case was under the care of a residential facility which assists adolescents experiencing mental health issues, and defense counsel questioned the complainant's competency, truthfulness, and her

mental stability. The defense alleged there is no physical evidence or witnesses to the alleged crimes other than the complainant, and so the complainant's credibility will be the determining factor in the outcome of the case. The defense requested an order enabling the defense to obtain medical records pertaining to the complainant, and interview any doctors, counselors, psychologists, or psychiatrists who have treated the complainant.

The Court entered the defense's requested qualified protective order because the District Attorney's Office had not filed an opposition. The District Attorney's Office filed a motion for reconsideration of that order on grounds the time for the State to file an opposition to the motion had not expired. The Court granted the motion for reconsideration and, after considering the parties' points and authorities, rescinded the qualified protective order.

The defense filed an ex parte motion for funds to hire Dr. Mark J. Chambers, Ph.D. to review the complainant's medical records. It appeared to this Court that granting the defense motion would, depending on the type of professional services the complainant had received, violate the psychologist and patient privilege under NRS 49.209, the doctor and patient privilege under NRS 49.225, and perhaps the family therapist and client privilege under NRS 49.247, the professional counselor and client privilege under NRS 49.2504, and the social worker and client privilege under NRS 49.252. Not wanting to act as an advocate for either party the Court provided a copy of the ex parte motion for funds to hire Dr. Chambers to the District Attorney's Office 's and appointed an attorney ad litem for the complainant so they could present the Court with law and argument regarding the defense motion and the privilege issues. In hindsight, it would have been better not to inform the District Attorney's Office and rely upon the attorney ad litem to advocate on behalf of the complainant.

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In its ex parte motion for funds to hire Dr. Chambers to review the complainant's medical records, the defense quoted the following communication it had received from Dr. Chambers, which statement the court had provided to the District Attorney's Office:

> If an individual, particularly a minor, has been housed in a mental health facility for 18 months or longer, that for me, raises significant concerns about her psychological functioning, her ability to function independently, and her capacity to perceive her surrounding environment and make rational decisions. These problems could, in turn, affect her reliability as a witness in a forensic setting. In reviewing her mental health records, I would look for any indications of intellectual impairment (e.g., IQ testing, history of special ed services), cognitive impairment (inability to recall or report external events accurately), or reality testing impairment (hallucinations, delusions, inability to distinguish fantasy from reality). Diagnoses that might suggest such impairment would include (but are not limited to): schizophrenia, delusional disorder, autism spectrum disorder, intellectual disability (aka, mental retardation), bipolar disorder, posttraumatic stress disorder, major depressive disorder with psychotic features, dissociative disorders, conduct disorder, and Cluster A personality disorders (e.g., schizotypal personality disorder).

The Court denied the motion for funds to hire Dr. Chambers on grounds the motion indicated only that Dr. Chambers would be hired to review the complainant's medical records which records this Court deemed are protected by statutory privilege.

The defense filed the instant motion to disqualify the Carson City District Attorney's Office on grounds the defendant cannot receive a fair trial because of the disclosure to the District Attorney's Office of the defense motion for funds to hire Dr. Chambers which included the above quoted statements of Dr. Chambers.

ARGUMENTS

The defense made three arguments in support of the motion to disqualify the District Attorney's Office: (1) that the disclosure to the District Attorney's Office of Dr. Chambers's statements in the above quoted communication violates NRS 174.245(2), which covers defense discovery disclosures; (2) because of the disclosure to the District Attorney's Office the District Attorney's Office knows of the defense's intention to hire

an expert, knows the privileged communications between defense counsel and Dr. Chambers, and the thoughts and impressions of defense counsel; and (3) as a result of the first two grounds, the defendant cannot receive a fair trial.

The District Attorney's Office pointed out that the defense had revealed, in its March 23, 2019 Motion for Qualified Protective Order, which the defense served upon the District Attorney's Office, its strategy of challenging the complainant's mental health, mental stability, veracity, and credibility. In that motion the defense argued in part:

> The alleged victim in this case is [complainant] a minor. The defense is aware that [complainant] has been treated on at least two occasions for mental health issues. Based on the interactions [complainant] has had with various persons involved in this investigation, counsel questions the mental health of [complainant], as it relates to truthfulness as well as the mental stability of [complainant] as related to veracity concerning this accusation. In order to effectively represent the Defendant and explore whether the accusation is the result of a mental health issue, it is necessary for this court to issue a Qualified Protective Order enabling the defense to obtain medical records pertaining to [complainant], interview any doctors, counselors, psychologist, or psychiatrists who have insight as to the mental stability of [complainant] or who may have evaluated or treated [complainant].

Mot. at 2. The defense Motion for Qualified Protective Order continued:

> Accordingly, [complainant's] credibility will be the determining factor in the outcome of this case. It is therefore essential that the defense be permitted to review medical records and investigate any statements made by [complainant] to doctors, counselors, psychologist, or psychiatrists regarding these allegations in order to explore potential defenses. It is necessary to determine, for example, whether [complainant] ever made any inconsistent or demonstrably untrue statements. It is likewise necessary for the defense to have access to the results of any relevant physical or mental examinations and to know the extent of any treatment recommended or provided.

Mot. at 3.

The District Attorney's Office pointed out that the communication from Dr. Chambers which forms the basis of the defense motion contains no medical opinions regarding the complainant or her credibility, and there are no "candid thoughts or impressions" of defense counsel or Dr. Chambers of note in the motion for a qualified

protective order. The District Attorney's Office argued the things Dr. Chambers said he would look for, intellectual disability, mental health diagnoses or other conditions which might affect perception, memory or recall are standard areas for challenging witness credibility, and that there was nothing specific or unique contained in Dr. Chambers' statement.

The District Attorney's Office further argued that under NRS 174.234(2) the defense would be required to disclose to the District Attorney's Office, not less than 21 days before trial or at such other time as the court directs, a written notice containing a brief statement regarding the subject matter on which the expert is expected to testify and the substance of the testimony.

In its reply the defense argued the District Attorney's Office has a privileged communication between defense counsel and Dr. Chambers and that the NRS 174.234(2) expert disclosure requirements do not require the defense to disclose the internal investigation conducted by the defense, to disclose trial strategy, to disclose privileged communications between counsel and experts in preparation for trial, or to disclose the defense's thoughts and impressions.

ANALYSIS

A comparison of the allegations and arguments of the defense in its motion for funds for Dr. Chambers and its Motion for Qualified Protective Order shows:

Motion for Funds for Dr. Chambers	**Motion for Qualified Protective Order**
Complainant is a minor	Complainant is a minor
Complainant has been housed in a mental health facility	Complainant has been treated for mental health issues on at least two occasions
There are significant concerns about complainant's psychological functioning, her ability to function independently, and her capacity to perceive	Counsel questions complainant's mental health as a relates to truthfulness, mental stability, veracity, and credibility

Dr. Chambers would look into complainant's intellectual impairment, cognitive impairment, reality testing impairment, and a list of possible diagnoses that might suggest impairment	The defense must have access to complainant's medical records, and be able to interview any doctors, counselors, psychologist, or psychiatrists who have insight as to the mental stability of complainant

The defense did not explicitly state in its Motion for Qualified Protective Order that it intended to hire a psychological expert, but it is clear from the content of the motion that the defense would be seeking funds for a psychological expert to review the records the defense hoped to obtain with the qualified protective order. There is no other significant difference between the information provided by the defense in the two motions. The disclosure of the ex parte motion for funds to hire Dr. Chambers did not provide the District Attorney's Office with any confidential information, any information about the internal investigation conducted by the defense, disclose trial strategy, or disclose the defense counsel's thoughts and impressions beyond what the defense had already disclosed to the District Attorney's Office in its Motion for Qualified Protective Order.

The defense argument that the state is now aware that the defense intends to hire a psychological expert and will therefore be in a position, if the defense does not present psychological testimony or evidence, to argue to the jury that the defense hired an expert but presented no testimony or evidence and therefore the jury should draw an adverse inference. This issue can be handled with a motion in limine as to whether the State would be allowed to make such an argument. It is not necessary to disqualify the District Attorney's Office based upon this defense argument.

Based upon the above analysis the defense argument based upon NRS 174.234(2) lacks merit.

CONCLUSIONS OF LAW

As stated above, with hindsight it would have been better if the Court had not disclosed the contents of the defense ex parte motion for funds to hire Dr. Chambers,

but the defense failed to show that it will be prejudiced by the disclosure of Dr. Chambers' statement in the email with defense counsel to the District Attorney's Office.

The defense failed to show that the disclosure to the District Attorney's Office of Dr. Chambers' statement in the email with defense counsel renders it unlikely that the defendant would receive a fair trial if the District Attorney's Office is allowed to continue prosecuting this case.

THE COURT ORDERS:

The defense Motion to Disqualify Carson City District Attorney's Office is denied.

DATED this 25 day of August, 2021.

James E. Wilson, Jr.
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on the 25 day of August 2021, I served a copy of this document by placing a true copy in an envelope addressed to:

Office of the District Attorny Melanie A. Brantingham, Esq. 885 E. Musser St., Ste. 2030 Carson City, NV 89701 (via clerk's office mail bin)	Office of the Public Defender William M. Murphy, Esq. 511 E. Robinson St., Ste. 1 Carson City, NV 89701 (via clerk's office mail bin)

the envelope sealed and then deposited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.

Billie Shadron
Judicial Assistant

NEVADA STATE PUBLIC DEFENDER
WILLIAM M. MURPHY, ESQ.
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Attorney For Defendant

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AUBREY ROWLATT
CLERK
BY K. PETERSON
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No.: 17 CR 00269 1B

JOSHUA DOUGLAS COUNSIL,
Defendant.

Dept. No.: II

/

DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES

The Defendant JOSHUA DOUGLAS COUNSIL, by and through his attorneys, KARIN L. KREIZENBECK, Nevada State Public Defender, and WILLIAM M. MURPHY, Chief Trial Deputy Public Defender, moves this Court for an Order to have E.D. and L.S. evaluated for competency, conduct a pre-trial hearing to assess and determine competency of E.D. and L.S. and continue to assess the witness's competency throughout the trial.

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This motion is made and based upon the Points and Authorities attached hereto and all the papers and pleadings on file herein.

DATED this 18th day of July, 2022.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM M. MURPHY
Chief Trial Deputy

POINTS AND AUTHORITIES

Joshua Counsil is charged by Amended Criminal Information for the following crimes:

Count I: Sexual Assault, a category A Felony as defined by NRS 200.366(1) and (3);

Count II: Sexual Assault Against a Child Under the age of 14 years, a category A Felony as defined by NRS 200.366(1) and (3);

Count III: : Sexual Assault Against a Child Under the age of 14 years, a category A Felony as defined by NRS 200.366(1) and (3);

Count IV: : Sexual Assault Against a Child Under the age of 14 years, a category A Felony as defined by NRS 200.366(1) and (3);

Count V: Lewdness with a Child Under 14 years of age, a category A Felony as defined by NRS 201.230);

Count VI: Attempted Lewdness with a Child Under 14 Years of Age, a category B Felony as defined by NRS 201.230 and NRS 193.330.

Jury trial is set to begin August 15, 2022.

1. The Court should order E.D. and L.S. to undergo a comprehensive psychological evaluation to evaluate competency.

The standard of competence for a child witness is that the child must have the capacity to receive just impressions and possess the ability to relate them truthfully. Wilson v. State, 96 Nev. 422, 423, 610 P.2d 184, 185 (1980). A child's testimony that is "inherently improbable" establishes the child's incompetency as a witness as a matter of law. Id. at 424. citing People v. Lamb, 121 Cal.App.2d 838, 264 P.2d 126, 130 (1953). Court's must evaluate a child's competency to testify on a case-by-case basis. Felix v. State, 109 Nev. 151, 849 P.2d 220 (1993), superseded by rule as stated in Evans v. State, 117 Nev. 609, 625, 28 P.3d 498, 509–10 (2001).

The Court can consider as relevant factors: 1). The child's ability to receive and communicate information; 2). The spontaneity of the child's statements; 3). Indications of "coaching" and "rehearsing"; 4). The child's ability to remember; 5). The child's ability to distinguish between the truth and falsehood; and 6). The likelihood that the child will give inherently improbable or incoherent testimony. Id. at 173. It is within the discretion of the Court to consider factors relevant to qualification and to determine if the witness is competent to testify. Shuff v. State, 86 Nev. 736, 476 P.2d 22 (1970). However, the Court must be satisfied that the child can give clear, coherent testimony and is capable of accurately perceiving the events and relating them to a jury. Id.; see also Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). When a serious question is raised about a child's ability to recollect and relate truthfully what he or she observed, or the testimony is inherently improbable, the child's competence to testify is seriously challenged. Felix, 109 Nev. at 174.

NRS 51.385 addresses the Admissibility of statements made by a child under the age of 10 years.

The statute reads as follows:

> **1.** In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:
>
> **(a)** The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and
>
> **(b)** The child testifies at the proceeding or is unavailable or unable to testify.
>
> **2.** In determining the trustworthiness of a statement, the court shall consider, without limitation, whether:
>
> **(a)** The statement was spontaneous;
>
> **(b)** The child was subjected to repetitive questioning;
>
> **(c)** The child had a motive to fabricate;
>
> **(d)** The child used terminology unexpected of a child of similar age; and
>
> **(e)** The child was in a stable mental state.

3. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the prosecution's intention to offer the statement in evidence.

In this case, E.D. was 6 years old when she made statements concerning conduct allegedly performed on her. NRS 51.385 requires a hearing be held.

A. Necessity of examination of E.D.

on July 6, 2017, the mother of E.D. made contact with Carson Sheriff's Office, Deputy Whitehead, to report a sexual assault. On July 6, 2017, E.D. was 6 years old. the mother of E.D. reported to Deputy Whitehead that E.D. told her that Defendant stared performing sexual acts on E.D. about 2 years prior, approximately May of 2015 and ending approximately the week of June 15, 2017. E.D.'s mother reported that E.D. was claiming the Defendant was sticking his fingers inside E.D.'s vagina on multiple occasions. Deputy Whitehead did not speak with or interview E.D. due to E.D. being 6 years old.

on July 6, 2017 Detective Acosta began an investigation. Detective Acosta arranged for a forensic interview. E.D was interviewed by the Child Advocacy Center in Washoe County. At that interview, E.D. stated Defendant put his fingers inside her, and stated Defendant penetrated her with his penis.

E.D. stated the Defendant did it the next day and did it again 10 times, once a day.

E.D. stated the first time was Christmas day in the bathroom. Detective Acosta concluded it must have been Christmas day of 2015 based on the presents E.D. received. E.D. reported multiple family members were present. The commission of such an act is inherently improbable due to the location of the bathroom being directly next to the living room and that multiple family members were in close proximity during the alleged incident.

E.D. stated another sexual allegation in the same bathroom. E.D. stated the sexual assaults always took place in the same location, in the bathroom of her grandmother's house.

E.D. stated on another occasion her mother knocked on the door. E.D. stated during another incident her father knocked on the door. E.D. stated on another occasion her brother knocked on the door.

E.D. stated there was one incident when a barbie doll was somehow used.

E.D. stated there was another incident where Defendant touched her vagina with his hand and another incident where Defendant performed fellatio.

E.D. stated the Defendant told her. that he was going to leave the Defendant's girlfriend for E.D. This seems inherently improbable considering E.D. was 6 years old at the time and was closely related to the Defendant.

During the interview, E.D. stated she remembered the bathroom where all the allegations took place because of certain features and "and there were flies in the sink and fly eggs." It was determined there were no flies in the sink and eggs. This may indicate a delusional state of mind or fanciful storytelling.

During the forensic interview, E.D. referred to the Defendant as "dousha" and informed the interviewer that she used to be a sweet, loving, kind girl and everything changed because of this crime. Such language is inconsistent with a child that age and is a probable result of coaching. E.D. also conveyed to the interviewer the recording of the interview could be used in lieu of E.D. having to testify, another probable indicator of coaching. Additionally, E.D. went on a rant about disliking President Donald Trump, again another probable indication of coaching in that E.D. was simply repeating whatever she heard concerning the topic.

Subsequently, E.D. was admitted to a mental health facility in Missouri for approximately 2 years. It is unknown why E.D. was admitted to a facility for such a long time

and the State has not pursued any inquiry in its investigation. Additionally, the State has opposed release of the medical records. Upon consultation with the Defense expert, Dr Marc Chambers, Dr. Chambers opined as follows:

> If an individual, particularly a minor, has been housed in a mental health facility for 18 months or longer, that, for me, raises significant concerns about her psychological functioning, her ability to function independently, and her capacity to perceive her surrounding environment and make rational decisions. These problems could, in turn, affect her reliability as a witness in a forensic setting. In reviewing her mental health records, I would look for any indications of intellectual impairment (e.g., IQ testing, history of special ed services), cognitive impairment (inability to recall or report external events accurately), or reality testing impairment (hallucinations, delusions, inability to distinguish fantasy from reality). Diagnoses that might suggest such impairment would include (but are not limited to): schizophrenia, delusional disorder, autism spectrum disorder, intellectual disability (aka, mental retardation), bipolar disorder, posttraumatic stress disorder, major depressive disorder with psychotic features, dissociative disorders, conduct disorder, and Cluster A personality disorders (e.g., schizotypal personality disorder).

E.D. has conveyed inconsistent allegations of sexual assault to multiple people. First, E.D. apparently conveyed to her mother digital penetration. This is what the mother reported to Deputy Whitehead. There were no additional allegations of sexual assault. E.D. then conveyed additional allegations during the forensic interview. This is inconsistent with the initial report and possibly demonstrates an inability to communicate information accurately and consistently or E.D.'s ability to remember. E.D. conveyed "memories", i.e. flies and fly eggs in the bathroom sink which were determined to be false.

Based on the above argument, it is respectfully requested this Court order E.D. to be evaluated for competency, conduct a pre-trial hearing to assess and determine competency and continue to evaluate competency throughout the duration of the testimony.

B. Necessity of examination of L.S.

on July 6, 2017, the mother of L.S. made contact with Carson Sheriff's Office, Deputy Whitehead, to report a sexual assault. On July 6, 2017, L.S. was 13 years old. The mother reported L.S. claimed the incident happened when L.S. was 9 years old. L.S.' s mother reported that L.S. told her that Defendant unzipped his pants and pulled out his penis and told L.S. to lick it. The mother also reported L.S. told the mother that Defendant held L.S. pinned her down on the bed.

L.S. spoke with Deputy Whitehead and reported the Defendant pulled his penis out and and asked L.S. to lick it like a lollipop. L.S. reported to Deputy Whitehead the Defendant grabbed L.S. and placed L.S. on her back on the bed, then grabbed her arms and stretched them above her head and separated her legs. L.S. L.S. reported to Deputy Whitehead that L.S.'s parents came into the room. Deputy Whitehead asked the mother about the incident and the mother did not remember such an incident. L.S. informed Detective Whitehead that L.S. did not lick the Defendant's penis. L.S. reported the Defendant has never attempted to try or do any other sexual acts since then.

The mother of L.S. reported L.S has been to West Hills for behavioral issues and suicidal issues. The mother also reported L.S. has been diagnosed with bi-polar.

L.S. was interviewed by the Child Advocacy Center in Washoe County for a forensic interview. L.S. did not confirm the allegations with the interviewer.

Based on L.S having a history of mental health issues and being unwilling to discuss the allegations with the forensic interviewer, it is apparent L.S is unable to give clear, coherent testimony and is incapable of accurately perceiving the events and relating them to a jury.

Based on the above argument, it is respectfully requested this Court order E.D. to be evaluated for competency, conduct a pre-trial hearing to assess and determine competency and continue to evaluate competency throughout the duration of the testimony.

CONCLUSION

Based upon the above argument, it is respectfully requested this Court order E.D. and L.S. to be evaluated for competency, conduct a pre-trial hearing to assess and determine competency and continue to evaluate competency throughout the duration of the testimony.

RESPECTFULLY SUBMITTED this 18th day of July, 2022.

KARIN L. KREIZENBECK
Nevada State Public Defender

By: _____
WILLIAM M. MURPHY
Chief Trial Deputy
511 East Robinson Street, Suite 1
Carson City, NV 89701
(775) 684-1080

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing

DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES

by preparing hand-delivery a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 18th day of July, 2022.

SIGNED: [signature]

REC'D & FILED
2022 JUL 28 PM 4:54
AUBREY ROWLATT
CLERK
BY
DEPUTY

Carson City District Attorney's Office
JASON D. WOODBURY
DISTRICT ATTORNEY
ALEXANDER E. QUAGGE
Deputy District Attorney
Nevada Bar No.: 13938
aquagge@carson.org
885 East Musser Street, Suite 2030
Carson City, NV 89701
Telephone (775) 887-2072
Facsimile (775) 887-2129
Representing State of Nevada

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

STATE'S OPPOSITION TO DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES

COMES NOW, the Plaintiff, STATE OF NEVADA, by and through counsel, JASON D. WOODBURY, District Attorney and Alexander E. Quagge, Deputy District Attorney in and for Carson City, State of Nevada, and herein enters its **STATE'S OPPOSITION TO DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES** in the above-captioned case wherein the Defendant

Office of the District Attorney
Carson City, Nevada
885 East Musser Street, Suite 2030, Carson City, NV 89701
Tel: (775) 887-2072 Fax (775) 887-2129

above-named is represented by Counsel, William M. Murphy Esq.

This opposition is based upon the points and authorities set forth below, all pleadings and papers heretofore filed in this case, and the arguments to be heard at any hearing upon this matter.

DATED this 28th day of July, 2022.

JASON D. WOODBURY
District Attorney

By: _____
ALEXANDER E. QUAGGE
Deputy District Attorney
Nevada Bar No. 13938

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STATEMENT OF THE CASE PERTINENT TO THIS OPPOSITION

Defendant, JOSHUA DOUGLAS COUNSIL, was charged by way of Amended Criminal Information with four counts of Sexual Assault (a category A Felony as defined by NRS 200.366(1) and (3)), one count of Lewdness with a Child Under 14 years of age (a category A Felony as defined by NRS 201.230), and one count of Attempted Lewdness with a Child Under 14 Years of Age (a category B Felony as defined by NRS 201.230 and NRS 193.330). The crimes occurred on or between January 25, 2013, and June 15, 2017. The victims are E.D. and L.S. Jury trial is set to begin August 15, 2022.

On July 18, 2022, Defendant filed a Motion Challenging Competency of E.D. and L.S. as witnesses. The Motion seeks an order from the Court for a psychological evaluation of the victims. The State's Opposition follows.

POINTS AND AUTHORITIES

NRS 50.700, which addresses psychological or psychiatric examinations of victims and witness to sexual offenses, has been in effect since 2015 and is controlling law. It reads as follows:

> **1. In any criminal or juvenile delinquency action relating to the commission of a sexual offense, a court may not order the victim of or a witness to the sexual offense to take or submit to a psychological or psychiatric examination.**
>
> 2. The court may exclude the testimony of a licensed psychologist, psychiatrist or clinical social worker who performed a psychological or psychiatric examination on the victim or witness if:
>
> (a) There is a prima facie showing of a compelling need for an additional psychological or psychiatric examination of the victim or witness by a licensed psychologist, psychiatrist or clinical social worker; and
>
> (b) The victim or witness refuses to submit to an additional psychological or psychiatric examination by a licensed psychologist, psychiatrist or clinical social worker.
>
> 3. In determining whether there is a prima facie showing of a compelling need for an additional psychological or psychiatric

examination of the victim or witness pursuant to subsection 2, the court must consider whether:

(a) There is a reasonable basis for believing that the mental or emotional state of the victim or witness may have affected his or her ability to perceive and relate events relevant to the criminal prosecution; and

(b) Any corroboration of the offense exists beyond the testimony of the victim or witness.

4. If the court determines there is a prima facie showing of a compelling need for an additional psychological or psychiatric examination of the victim or witness, the court shall issue a factual finding that details with particularity the reasons why an additional psychological or psychiatric examination of the victim or witness is warranted.

5. If the court issues a factual finding pursuant to subsection 4 and the victim or witness consents to an additional psychological or psychiatric examination, the court shall set the parameters for the examination consistent with the purpose of determining the ability of the victim or witness to perceive and relate events relevant to the criminal prosecution.

6. As used in this section, "sexual offense" includes, without limitation:

(a) Sexual assault pursuant to NRS 200.366;

(b) Statutory sexual seduction pursuant to NRS 200.368;

(c) Battery with intent to commit sexual assault pursuant to NRS 200.400;

(d) Abuse of a child pursuant to NRS 200.508, if the abuse involved sexual abuse or sexual exploitation;

(e) An offense involving pornography and a minor pursuant to NRS 200.710 to 200.730, inclusive;

(f) Incest pursuant to NRS 201.180;

(g) Open or gross lewdness pursuant to NRS 201.210;

(h) Indecent or obscene exposure pursuant to NRS 201.220;

(i) Lewdness with a child pursuant to NRS 201.230;

(j) Sexual penetration of a dead human body pursuant to NRS 201.450;

(k) An offense involving the administration of a drug to another person with the intent to enable or assist the commission of a felony pursuant to NRS 200.405, if the felony is an offense listed in this section;

(l) An offense involving the administration of a controlled substance to another person with the intent to enable or assist the commission of a crime of violence pursuant to NRS 200.408, if the crime of violence is an offense listed in this section;

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(m) Luring a child or a person with mental illness pursuant to NRS 201.560;

(n) An offense that is found to be sexually motivated pursuant to NRS 175.547 or 207.193;

(o) Pandering of a child pursuant to NRS 201.300;

(p) Any other offense that has an element involving a sexual act or sexual conduct with another person; or

(q) Any attempt or conspiracy to commit an offense listed in this subsection.

Emphasis added.

Because E.D. and L.S. are victims of sexual offenses as defined by NRS 50.700(6), NRS 50.700(1) specifically precludes this Court from ordering E.D. and L.S. to undergo psychological examinations. Furthermore, the State has not noticed, nor does it intend on calling as a witness, any psychologist who has treated or otherwise conducted a personal interview of either victim; therefore, there is no compelling need for an additional evaluation as described in NRS 50.700(2) through 50.700(5). Defendant's analysis of previous case law as it relates to independent psychological examinations of victims of sexual offenses does not overcome the current statutory scheme, which precludes such an order.

DATED this 28th day of July, 2022.

JASON D. WOODBURY
District Attorney

By: _____
ALEXANDER E. QUAGGE
Deputy District Attorney
Nevada Bar No. 13938

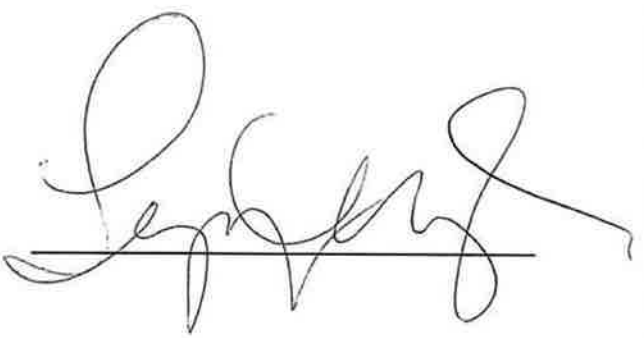
Office of the District Attorney
Carson City, Nevada
885 East Musser Street, Suite 2030, Carson City, NV 89701
Tel: (775) 887-2072 Fax (775) 887-2129

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Carson City District Attorney and that on this 28th day of July, 2022, I caused to be served a copy of the foregoing document, titled: **STATE'S OPPOSITION TO DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES** by faxing and placing a copy of said document in the Public Defender's box for pick-up addressed to:

Nevada State Public Defender
511 East Robinson Street Suite 1
Carson City, NV 89701

(775) 684-1080



Office of the District Attorney
Carson City, Nevada
885 East Musser Street, Suite 2030, Carson City, NV 89701
Tel: (775) 887-2072 Fax (775) 887-2129

NEVADA STATE PUBLIC DEFENDER
WILLIAM M. MURPHY, ESQ.
Nevada State Bar No. : 11424
511 E. Robinson St., Ste 1
Carson City, NV 89701
Ph: (775) 684-1080 / Fax: (775) 687-4993
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Attorney For Defendant

FILED
2022 AUG -1 PM 4:21
AUBREY ROWLATT
CLERK
BY K. PETERSON
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No.: 17 CR 00269 1B

JOSHUA DOUGLAS COUNSIL,

Dept. No.: II

Defendant.

/

DEFENDANT'S REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES

The Defendant JOSHUA DOUGLAS COUNSIL, by and through his attorneys, Nevada State Public Defender, and WILLIAM M. MURPHY, Chief Trial Deputy Public Defender, moves this Court for an Order to have E.D. and L.S. evaluated for competency, conduct a pre-trial hearing to assess and determine competency of E.D. and L.S. and continue to assess the witness's competency throughout the trial.

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This motion is made and based upon the Points and Authorities attached hereto and all the papers and pleadings on file herein.

DATED this 1st day of August, 2022.

By: _____
WILLIAM M. MURPHY
Chief Trial Deputy

POINTS AND AUTHORITIES

The State basis its opposition on NRS 50.700 which states a court may not order the victim of a sexual offense to take or submit to a psychological or psychiatric exam. The State's opposition motion does not challenge the competency of the E.D. and L.S. as argued in Defendant's motion. Defendant respectfully requests this Court grant the Defendant's motion pursuant to FJDCR 3.7(e) and D.C.R 13(2) and order E.D. and L.S. are not competent to testify, and any prior statements made by E.D. and L.S. are not competent and inadmissible.

The Defense argued that E.D. and L.S. were not competent and requested this Court order an evaluation to evaluate competency, conduct a pre-trial hearing to assess and determine competency and continue to evaluate competency throughout the duration of the testimony. The Defendant's motion set forth multiple examples supporting the questionable competency of E.D. and L.S. The Defendant's motion provided case law relevant to analysis of the issue as well as NRS 51.385. NRS 51.385 requires the Court to hold a hearing and make findings based on the considerations, without limitation, as set forth in section two and case law. The Defense asserts E.D.'s and L.S.'s statements lack guarantees of trustworthiness pursuant to the five factors and case law. The State does not challenge the guarantees of trustworthiness of the statements, but simply opposes an evaluation based on 50.700 prohibiting an exam. The State has failed to challenge the Defendant's assertion that E.D. and L.S. are not competent to testify and prior statements are inadmissible.

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CONCLUSION

Based upon the above argument, it is respectfully requested this Court order E.D. and L.S. are not competent to testify and any prior statements made by E.D. and L.S. are not competent and inadmissible.

RESPECTFULLY SUBMITTED this 1st day of August, 2022.

By: _____

WILLIAM M. MURPHY
Chief Trial Deputy
511 East Robinson Street, Suite 1
Carson City, NV 89701
(775) 684-1080

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing

DEFENDANT'S REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES

by preparing hand-delivery a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 1st day of August, 2022.

SIGNED: _____

NEVADA STATE PUBLIC DEFENDER
WILLIAM M. MURPHY, ESQ.
NEVADA STATE BAR NO. 11424
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ATTORNEY FOR DEFENDANT

FILED
2022 AUG -1 PM 4:21
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BY K. PETERSON
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,
Plaintiff,

vs.

JOSHUA DOUGLAS COUNSIL,
Defendant.
_____/

Case No. 17 CR 00269 1B

Dept. II

REQUEST FOR SUBMISSION OF DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES, STATE'S OPPOSITION AND DEFENDANT'S REPLY

The Defendant, JOSHUA DOUGLAS COUNSIL, by and through her attorneys, Nevada State Public Defender, and WILLIAM M. MURPHY, Chief Trial Deputy Public Defender, respectfully requests that the Defendant's Motion Challenging Competency of E.D. and L.S. as Witnesses, State's Opposition and Defendant's Reply be submitted for consideration by the court.

DATED this 5th day of August, 2022.

Nevada State Public Defender

By: _____

WILLIAM M. MURPHY,
Chief Trial Deputy Public Defender

CERTIFICATE OF SERVICE

I certify that I am an employee of the office of the Nevada State Public Defender and that on the date shown below, I served a copy of the foregoing REQUEST FOR SUBMISSION by preparing for hand-delivery a true and correct copy thereof addressed to:

CARSON CITY DISTRICT ATTORNEY
885 E MUSSER ST #2030C
CARSON CITY NV 89701

DATED this 1st day of August, 2022.

SIGNED: _____

REC'D & FILED
2022 AUG -5 PM 2:32
AUBREY ROWLATT
CLERK
BY_____
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Plaintiff,

vs.

Case No.: 17 CR 00269 1B

Dept. No.: 2

JOSHUA DOUGLAS COUNSIL,

Defendant.

/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION CHALLENGING COMPETENCY OF E.D. AND L.S. AS WITNESSES

The above-entitled matter, having come before this Court on the Motion to challenge the competency of E.D. and L.S. as witnesses,

The standard of competence for a child witness is that the child must have the capacity to receive just impressions and possess the ability to relate them truthfully. *Wilson v. State*, 96 Nev. 422, 423, 610 P.2d 184, 185 (1980). A child's testimony that is "inherently improbable" establishes the child's incompetency as a witness as a matter of law. Id. at 424. citing *People v. Lamb*, 121 Cal.App.2d 838, 264 P.2d 126, 130 (1953). Court's must evaluate a child's competency to testify on a case-by-case basis. *Felix v. State*, 109 Nev. 151, 849 P.2d 220 (1993), superseded by rule as stated in *Evans v. State*, 117 Nev. 609, 625, 28 P.3d 498, 509–10 (2001). The Court can consider as relevant factors: 1). The child's ability to receive and communicate information; 2). The spontaneity of the child's statements; 3). Indications of "coaching" and "rehearsing"; 4). The child's ability to remember; 5). The child's ability to distinguish between

the truth and falsehood; and 6). The likelihood that the child will give inherently improbable or incoherent testimony. Id. at 173. It is within the discretion of the Court to consider factors relevant to qualification and to determine if the witness is competent to testify. *Shuff v. State,* 86 Nev. 736, 476 P.2d 22 (1970). However, the Court must be satisfied that the child can give clear, coherent testimony and is capable of accurately perceiving the events and relating them to a jury. Id.; see also *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001). When a serious question is raised about a child's ability to recollect and relate truthfully what he or she observed, or the testimony is inherently improbable, the child's competence to testify is seriously challenged. Felix, 109 Nev. at 174.

NRS 51.385 addresses the Admissibility of statements made by a child under the age of 10 years. That statute requires the Courts hold a hearing outside the presence of the jury to determine whether the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness.

THE COURT ORDERS:

The defense request that E.D. and L.S be evaluated for competency is denied.

After the jury is scheduled and before opening statements, the Court will hold a hearing outside the presence of the jury to determine whether statements of the child that the State intends to offer at trial provide sufficient circumstantial guarantees of trustworthiness.

DATED this 5 day of August, 2022.

JAMES E. WILSON, JR.
District Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of the First Judicial District Court of Nevada; that on the 5 day of August 2022, I served a copy of this document by placing a true copy in an envelope addressed to:

Melanie Brantingham, Esq. Office of the District Attorney 885 E. Musser St., Ste. 2030 Carson City, NV 89701 (via clerk's office mail bin)	William Murphy, Esq. Office of the Public Defender 511 E. Robinson St., Ste. 1 Carson City, NV 89701 (via clerk's office mail bin)

the envelope sealed and then deposited in the Court's central mailing basket in the court clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for mailing.

Billie Shadron
Judicial Assistant

REC'D & FILED

AUG - 8 2022

Date

AUBREY ROWLATT
CLERK

By J. HIGGINS Deputy

Carson City District Attorney's Office
JASON D. WOODBURY
DISTRICT ATTORNEY
MELANIE A. BRANTINGHAM
Supervising Deputy District Attorney
Nevada Bar No.: 9152
mbrantingham@carson.org
885 East Musser Street, Suite 2030
Carson City, NV 89701
Telephone (775) 887-2072
Facsimile (775) 887-2129
Representing State of Nevada

IN THE CARSON CITY ~~JUSTICE~~ District COURT

IN AND FOR CARSON CITY, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,

Defendant.

Case No. 17 CR 00269 1B

Dept. No. II

MEMORANDUM OF PLEA NEGOTIATION

I, JOSHUA DOUGLAS COUNSIL, by and through WILLIAM M. MURPHY, Chief Deputy Public Defender, Nevada State Public Defender and MELANIE A. BRANTINGHAM, Supervising Deputy District Attorney in and for Carson City, State of Nevada, hereby agree to plead NO CONTEST, pursuant to NRS 174.035, to **CHILD SEXUAL ABUSE OR EXPLOITATION CAUSING SUBSTANTIAL MENTAL HARM, CHILD UNDER 14**, a violation of NRS 200.508(1)(a)(1), a category A Felony, and as

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more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead NO CONTEST is based upon the plea agreement in this case which is as follows:

At sentencing, both parties will be free to argue for any legally appropriate sentence and to present evidence to support their recommendations. This includes being free to argue for or against probation, if the Defendant is certified as not representing a high risk to reoffend pursuant to NRS 176A.110. In addition, the State specifically allows the Defendant to reserve the right to appeal any decisions made by the Court in any pretrial motions in this case. The State will dismiss Case No. 19 CR 00742 1C wherein the Defendant was charged with Possession of a Dangerous Weapon by a Prisoner. All other charges pending or available as a result of these specific episodes of criminal conduct will be dismissed or not pursued. Specifically, the State will not file any new criminal charges related to disclosures made by victim L.S. in her interview given on July 21, 2022, in Carson City, Nevada.

CONSEQUENCES OF THE PLEA

By pleading NO CONTEST, it is my desire to avoid the possibility of being convicted of more offenses or of a greater offense if I were to proceed to trial on the original charge and of also receiving a greater penalty. I understand that my decision to plead NO CONTEST does not require me to admit guilt but is based upon my belief that the State would present sufficient evidence at trial that a jury would return a verdict of guilty of a greater offense or of more offenses than that to which I am pleading NO CONTEST to.

I understand that as a consequence of my plea of NO CONTEST to the charge of **CHILD SEXUAL ABUSE OR EXPLOITATION CAUSING SUBSTANTIAL**

MENTAL HARM, CHILD UNDER 14, I may be imprisoned in the Nevada Department of Corrections for a period of life, with eligibility for parole beginning once I have served 15 years. I understand that restitution may be required. I understand that the law requires me to pay a $25.00 Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense to which I am pleading NO CONTEST and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I further acknowledge that I have been advised that if I am not a United States citizen, pursuant to Federal Immigration Law, conviction of this felony or gross misdemeanor may result in deportation, revocation of resident alien status, visa or work permit, denial of re-admission to the United States, and denial of naturalization should I apply.

I understand that I am eligible for probation for the offense to which I am pleading NO CONTEST, if a psychosexual evaluation is performed pursuant to NRS 179A.110(1)(a), and the person conducting the evaluation certifies in the report prepared pursuant to NRS 176.139 that I do not represent a high risk to reoffend based upon a currently accepted standard of assessment.

Further, as provided by NRS 176.0931, I am to receive a special sentence of lifetime supervision. Pursuant to NRS 176A.410, if I am convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall order specific conditions of probation or suspension of sentence. Additionally, pursuant to NRS 213.1245, there are mandatory conditions of parole if convicted of a sexual offense.

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The following are among those conditions: (1) Abstain from consuming, possessing or having under your control any alcohol; (2) Not have contact or communicate with a victim of sexual offense or a witness who testified against the defendant or solicit another person to engage in such contact or communication of behalf of the defendant, unless approved by the parole and probation officer assigned to the defendant, and a written agreement is entered into; (3) Not have any contact with a person less than 18 years of age in a secluded environment unless another adult who has never been convicted of a sexual offense is present and permission has been obtained from the parole and probation officer assigned to me in advance of each such contact; (4) Unless approved by the parole and probation officer assigned to the defendant and by a psychiatrist, psychologist, or counselor treating the defendant, if any, not be in or near (a) a playground, park, school, or school grounds; (b) a motion picture theater; or (c) a business that primarily has children as customers or conducts events that primarily children attend; (5) Not patronize a business which offers a sexually related form of entertainment and which is deemed inappropriate by the parole & probation officer assigned to the defendant; and (6) Not possess any electronic device capable of accessing the Internet and not access the Internet through any such devise or any other means, unless possession of such a device or such access is approved by the parole and probation officer assigned to the defendant.

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

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the

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discretion to order the sentences served concurrently or consecutively.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report and its contents, including, but not limited to, all facts and circumstances of the offense.

I understand that if the State of Nevada has agreed to recommend a particular sentence or has agreed not to present argument regarding the sentence, or has agreed not to oppose a particular sentence, such agreement is contingent upon my appearance in court on the initial sentencing date and any subsequent date if the sentencing is continued. I understand that if I fail to appear for the scheduled sentencing date, or if I fail to appear at or am terminated from any counseling program or specialty court program ordered prior to sentencing, or I commit a new criminal offense prior to sentencing, the State of Nevada would regain the full right to argue for any lawful sentence.

WAIVER OF RIGHTS

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By entering my plea of NO CONTEST, I understand that I am waiving and giving up the following rights and privileges:

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

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

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

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

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

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035, and except as specifically stated above. I understand that if I wish to appeal, I must notify my attorney as soon as possible, and that the Notice of Appeal must be filed within thirty (30) days from the judgment of conviction.

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VOLUNTARINESS OF PLEA

I have discussed the elements of the original charge against me with my

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attorney and I understand the nature of the charge against me.

I understand that the State would have to prove each element of the charge against me at trial.

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

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

I believe that pleading NO CONTEST and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

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

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Office of the District Attorney
Carson City, Nevada
885 East Musser Street, Suite 2030, Carson City, NV 89701
Tel: (775) 887-2072 Fax (775) 887-2129

My attorney has answered all my questions regarding the NO CONTEST plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 7th day of August, 2022.

JOSHUA DOUGLAS COUNSIL
Defendant

AGREED TO BY:

MELANIE A. BRANTINGHAM
Supervising Deputy District Attorney
Nevada Bar No. 9152

8/8/2022
Date

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CERTIFICATE OF COUNSEL

I, WILLIAM M. MURPHY, ESQ., as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge to which NO CONTEST pleas are being entered.

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

3. All pleas of NO CONTEST offered by the Defendant pursuant to this agreement are consistent with the facts known to me, are made with my advice to the Defendant and are in the best interest of the Defendant.

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

   a. Is competent and understands the charges and the consequences of pleading NO CONTEST as provided in this agreement.

   b. Executed this agreement and will enter all NO CONTEST pleas pursuant hereto voluntarily.

   c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

Dated this 7th day of August, August, 2022.

William M. Murphy, Esq.
Nevada Bar No. 11424
Nevada State Public Defender's Office
511 E. Robinson, Suite 1
Carson City, NV 89701
(775) 684-1080
Attorney for Defendant

REC'D & FILED
AUG - 8 2022
Date
AUBREY ROWLATT
CLERK
By _____ Deputy

Carson City District Attorney's Office
JASON D. WOODBURY
DISTRICT ATTORNEY
MELANIE A. BRANTINGHAM
Supervising Deputy District Attorney
Nevada Bar No.: 9152
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Representing State of Nevada

IN THE CARSON CITY ~~JUSTICE~~ District COURT

IN AND FOR CARSON CITY, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

v.

JOSHUA DOUGLAS COUNSIL,
PCN #:

Defendant.

Case No. 17 CR 00269 1B

Dept. No.

THIRD AMENDED CRIMINAL INFORMATION

STATE OF NEVADA)
):ss
CARSON CITY)

JASON D. WOODBURY, District Attorney in and for Carson City, State of Nevada, by Melanie A. Brantingham, Supervising Deputy District Attorney, in the name and by the authority of the State of Nevada, informs the Court that JOSHUA DOUGLAS COUNSIL, the Defendant, above-named, at Carson Township, in Carson City, State of Nevada, has committed the crime(s) of: **CHILD SEXUAL ABUSE OR**

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EXPLOITATION CAUSING SUBSTANTIAL MENTAL HARM, CHILD UNDER 14, a violation of NRS 200.508(1)(a)(1), a category A Felony, in the manner following:

Count I

CHILD SEXUAL ABUSE OR EXPLOITATION CAUSING SUBSTANTIAL MENTAL HARM, CHILD UNDER 14

(A CATEGORY A FELONY - NRS 200.508(1)(a)(1))

That the Defendant, Joshua Douglas Counsil, on or between January 25, 2013 and June 16, 2017, at Carson Township, in Carson City, State of Nevada, did willfully and unlawfully cause a child who is less than 14 years of age to suffer unjustifiable physical pain or mental suffering as a result of sexual abuse or exploitation resulting in substantial mental harm to the child, in the manner following, to wit: the Defendant sexually assaulted E.D. (DOB 8/29/2010) on one or more occasions and/or the Defendant committed acts which constitute Lewdness with a Minor with L.S. (DOB 1/25/2004) on one or more occasions, causing E.D. and/or L.S. to suffer substantial mental harm, all of which occurred at or near 2349 Dori Way Unit B and/or 400 W. Winnie Lane, Carson City, Nevada.

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

DATED this 5th day of August, 2022.

Melanie A. Brantingham

MELANIE A. BRANTINGHAM
Supervising Deputy District Attorney
Nevada Bar No. 9152

Office of the District Attorney
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The following are the names of such witnesses for the State of Nevada as are known to me at the time of filing this Information:

Sergeant Sal Acosta
Sheriff Office Carson City
911 E. Musser Street
Carson City, NV 89701

Alexis Auckenthaler
311 Bennett St. #13
Grass Valley, CA 95945

Brett John Bindley
Sheriff Office Carson City
911 E. Musser Street
Carson City, NV 89701

Karlie Callahan
Reno Police Department Victim Advocate

Carson City Sheriffs Office Crime Lab
Carson City Sheriff's Office
911 E. Musser Street
Carson City, NV 89701

Child Advocacy Center - Reno
2097 Longley Lane
Reno, NV 89502

Uriel Collazo
Sheriff Office Carson City
911 E. Musser Street
Carson City, NV 89701

Jeannine Counsil
545 Starlite Drive Unit #B
Fernley, NV 89408

Jeffrey Counsil
545 Starlite Drive- Unit B
Fernley, NV 89408

E.D., a Minor
580 Starlite Drive, #B
Fernley, NV 89408

CCSO Dispatch Center
4645 Snyder Avenue
Carson City, NV 89701

Heidi Figueroa

Patricia Franklin
2349 Dori Way Unit B
Carson City, NV 89701

Game Stop
963 Topsy Ln
Carson City, NV 89705

Lieutenant Daniel Gonzales
Sheriff Office Carson City
911 E. Musser St.
Carson City, NV 89701

Katherine Kimball
2349 Dori Way Unit B
Carson City, NV 89706

China Scott
118 Joy Way
Portola, CA 96122

Janee Morgan Smith
580 Starlite Drive, #B
Fernley, NV 89408

L.S., a Minor.
580 Starlite Drive, # B
Fernley, NV 89408

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Deputy Samantha Torres
Sheriff Office Carson City
911 E. Musser Street
Carson City, NV 89701

David Warner
2206 East Long Street Apt. B
Carson City, NV 89701

James Michael White
Transient

Deputy Justin Whitehead
Sheriff Office Carson City
911 E. Musser Street
Carson City, NV 89701

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CERTIFIED COPY

Case No. 17 CR 00269 1B

Department II

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

HONORABLE JAMES WILSON, DISTRICT JUDGE

THE STATE OF NEVADA,

Plaintiff,

vs.

JOSHUA DOUGLAS COUNSIL,

Defendant.

_____/

TRANSCRIPT OF PROCEEDINGS

CHANGE OF PLEA HEARING

MONDAY, AUGUST 8, 2022

CARSON CITY, NEVADA

Transcribed by: Shellie Loomis, RPR

APPEARANCES:

For the State of Nevada:	Melanie Brantingham, Deputy District Attorney Carson City, Nevada
For the Defendant:	William Murphy, Chief Deputy Public Defender Carson City, Nevada
Also present:	Department of Parole and Probation

CARSON CITY, NEVADA, MONDAY, AUGUST 8, 2022, A.M. SESSION

-o0o-

THE COURT: Please be seated. 17-CR-269, State versus Counsil. This is the time set for a change of plea. Miss Brantingham is present for the State. Mr. Counsil is present with his attorney Mr. Murphy.

Mr. Counsil, do you want to change your plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Would you please stand face the clerk here and raise your right hand the best you can.

(Defendant sworn.)

THE COURT: I need for you to remain standing. Joshua Douglas Counsil your full, true and correct name?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have a copy of the Third Amended Criminal Information in front of you?

THE DEFENDANT: I do, Your Honor.

THE COURT: Is your name correctly spelled on the first page of that Third Amended Criminal Information?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you go by -- are you known by any other names?

THE DEFENDANT: Just a shortened version of

Joshua, I go by Josh most commonly.

THE COURT: This is (indiscernible) proceeding. If I accept your accept your plea today, it's going to be very difficult if not impossible for you to come back later and try to withdraw your plea.

Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: For that reason, it's very important that you understand everything that goes on during this hearing.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: It's also very important that you're very sure that this is the plea that you want to enter.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you want or need any more time to speak with anyone else to think about this plea?

THE DEFENDANT: No, your Honor.

THE COURT: If you have any questions or concerns as we go through this, you can speak with Mr. Murphy at any time.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Sometimes as I'm going through this, I feel like people might think that I'm trying to talk them into or out of something. That is not the case. My job is to make sure that you understand everything having to do with this plea agreement, that you're freely and voluntarily waiving your rights and entering the plea.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is there any reason that you cannot give your full attention to what's going on in this hearing right now?

THE DEFENDANT: No, your Honor.

THE COURT: Are you emotionally distraught, physically ill, injured, pain, anything like that?

THE DEFENDANT: No, your Honor.

THE COURT: You have been in jail for how long now?

THE DEFENDANT: Just under five years, Your Honor.

THE COURT: Are you in general population?

THE DEFENDANT: No.

THE COURT: So how much contact do you have with people outside of your cell.

THE DEFENDANT: There's other people in my unit,

it's an isolated units, it's protective custody, there's myself and a lot of others.

THE COURT: So being locked up for that amount of time, could have an effect on a person's mental abilities. Do you think that's affecting your mental abilities?

THE DEFENDANT: Not in this case, Your Honor.

THE COURT: Okay. Have you ever been diagnosed with a mental illness or personality disorder?

THE DEFENDANT: Yes, Your Honor.

THE COURT: When was that?

THE DEFENDANT: At four years old I was diagnosed with severe ADHD.

THE COURT: Okay.

THE DEFENDANT: And I was recommended by whatever doctor that I was seeing that I be turned over to the state as a ward. My parents deified that. I feel that they've done a reasonably well job of raising me.

THE COURT: Okay. Any other diagnoses? Mental health, personality disorder?

THE DEFENDANT: Yes. Before it was changed to the bipolar one, but bipolar two I was diagnosed with severe depression and acute anxiety disorders.

THE COURT: When was that?

THE DEFENDANT: As a teenager, I don't recall the

exact year.

THE COURT: Okay. Any others?

THE DEFENDANT: No, your Honor.

THE COURT: Are you under any ongoing care for mental health?

THE DEFENDANT: No, your Honor.

THE COURT: So you're not taking any medications --

THE DEFENDANT: Well, I -- yes, I am, I am taking antidepressants and antianxiety medications.

THE COURT: Are you taking those as far as you know as prescribed?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you think that the medication or a combination of medications are affecting your ability to think, reason and understand?

THE DEFENDANT: No, your Honor.

THE COURT: Are you under the influence of any alcohol, drugs or medication this morning?

THE DEFENDANT: No, your Honor.

THE COURT: How old are you?

THE DEFENDANT: 30.

THE COURT: What's the highest grade in school you completed?

THE DEFENDANT: 11th grade.

THE COURT: When you were in school were you in regular classes, special education?

THE DEFENDANT: I was taking a special education focus program and I was under the guidance of an IEP program.

THE COURT: Are you able to read?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Murphy, have you observed anything in your contacts with Mr. Counsil that raise any issue in your mind about competency?

MR. MURPHY: Not at all.

THE COURT: Have you had enough time to speak with Mr. Murphy about your case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Can you estimate for me how many times whether it be in person or on the phone that you've had contact with him?

THE DEFENDANT: Over the past five years, probably close to a hundred times all together.

MR. MURPHY: And also if it pleases the Court is I have an investigator that was an instrumental part of making contact with Mr. Counsil and helping me as far as various requests of Mr. Counsil and Mr. Bovard had more contact than Mr. Counsil and I did.

THE COURT: Okay. How much contact have you had with Mr. Murphy say this year since January?

THE DEFENDANT: Since January, earlier on in the year not as much because we were just waiting for trial, but over the past I'd say month or two, I've had significant contact with him.

THE COURT: All right. When you were speaking with Mr. Murphy about your case, did you understand everything that he was telling you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is there anything that you wanted Mr. Murphy to do or you were expecting him to do that's left undone right now?

THE DEFENDANT: There was one thing a couple months ago, I had requested a bail hearing.

THE COURT: Okay.

THE DEFENDANT: Through him with special requests as to my bail and that was never done, but other than that there has been no undone requests.

THE COURT: Okay. I ask everybody this question, it doesn't have anything to do with Mr. Murphy in particular.

Do you have any issues at all with his representation of you other than the bail hearing?

THE DEFENDANT: Other than the fact that he's a

public defender, and I have heard rumors and feel that some of them are true based on my observances, other than that, no. He himself has I believe represented me very properly.

THE COURT: All right.

THE DEFENDANT: Adequately.

MR. MURPHY: And I think it's important that since he did say no whatever there seemed to be significant ambiguity there to explain what his opinion of the public defender's office, to clarify that, just so there's no hick up down the road.

THE COURT: Can you expand on that for me?

THE DEFENDANT: I feel that, I've heard, I feel that the public defender's office and the district attorney's office work very closely together. To the exact extent I have no idea, but as they are both paid and funded by the state itself, I am not sure if there's anything inappropriate going on between the two parties, but I, you know, such as talking about things out of ear shot of clients that should be protected.

I don't -- like I said, I'm not sure because I haven't, you know, I'm not party to any of those conversations that may have happened, but I feel that in some instances they work together to get convictions.

THE COURT: When it comes to Mr. Murphy and your

case right now, that's not a concern for you --

THE DEFENDANT: No.

THE COURT: -- or is it?

THE DEFENDANT: No, Your Honor.

MR. MURPHY: And if I can elaborate, Your Honor, to address those concerns that they have been brought up is the DA's office and our office are paid by two separate government entities.

We are not -- I'm a state employee, the DA's office is a county employee. They're complete, two completely different government entities which are not drawing from the same pot in any way, shape or form.

Also I've never discussed with the DA any confidential communications that I've had with my client in any way, shape or form, nor hinted anything that in an intent to circumvent that.

And we do not work -- as far as working together, we do work together closely because between the district attorney's criminal division and our office we handle the vast majority of criminal cases that come through the Carson City system so we are obligated to work together in a professional manner in order to keep the cases moving. That does not mean by that both agencies do not zealously pursue their position, whether it be to prosecute or to defend.

And as far as working together to get a conviction, that's not the truth. We will work together to try and get a resolution, it's not necessarily a conviction. I am not an advocate for the prosecuting attorney's office.

My position is to represent my clients and if that does result in a conviction which I think is in the best interests of my client I will advise my client to that.

THE COURT: Ms. Brantingham.

MS. BRANTINGHAM: And I'll just add to that, Mr. Murphy and I have negotiated this case at arms length. I have nothing but the highest regard for his ethics and there's not been anything that I would even question in this case.

THE COURT: Thank you.

Miss Brantingham, has all of the discovery been made available to the defense and if applicable any Brady material?

MS. BRANTINGHAM: It has. There's not any Brady material, but all discovery has been provided.

THE COURT: Did it appear that's the case, Mr. Murphy?

MR. MURPHY: It does.

THE COURT: Have you done over that with Mr. Counsil.

MR. MURPHY: Yes.

THE COURT: Everything?

MR. MURPHY: Everything that I have, yes. Even including the videos, including the body cams, I think everything that I have Mr. Counsil has a copy of or has reviewed.

THE COURT: Is that accurate, Mr. Counsil?

THE DEFENDANT: Yes, Your Honor.

THE COURT: As far as you know.

THE DEFENDANT: As far as I know, yes, Your Honor.

THE COURT: Have you read the Third Amended Criminal Information?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has Mr. Murphy answered any questions you have about this charge?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has he discussed with you possible defenses you might have to the charge?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has he discussed with you things that might, any circumstances that might be in your favor in your case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The criminal information charges you

with child sexual abuse or exploitation causing substantial mental harm, a child under 14, a Category A felony.

It alleges that you on or between January 25, excuse me, on or between January 25, 2013, and June 16, 2017, in Carson City, Nevada, did willfully and unlawfully cause a child who was less than 14 years of age to suffer unjustifiable physical pain or mental suffering as a result of sexual abuse or exploitation resulting in substantial mental harm to the child in the manner following.

To wit, the Defendant sexually assaulted E.D., date of birth, 8/29 2010 on one or more occasions and/or the Defendant committed acts which constitute lewdness with a minor with L.S., date of birth 1/25 2004 on one or more occasions, causing E.D. and/or L.S. to suffer substantial mental harm, all of which occurred at or near 2349 Dori Way Unit B, and/or 400 West Winnie Lane, Carson City, Nevada.

Do you understand the charge?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Murphy, does it appear to you in your speaking with him that he does, in fact, understand this charge?

MR. MURPHY: Yes.

THE COURT: The State would have to prove all the essential facts of this offense in order -- beyond a

reasonable doubt in order for them to get a conviction.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So they would have to prove that on or between January 25, 2013, and June 16, 2017, in Carson City, Nevada, that you did willfully and unlawfully sexually assault E.D. whose date of birth is 8/29, 2010 and/or committed acts which constitute lewdness with L.S., date of birth, 1/25, 2004, causing E.D. and/or L.S. to suffer substantial bodily harm.

Do you understand what the State would have to prove?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If they failed to prove any of those essential elements, you would have to be found not guilty.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If they failed to prove any of those beyond a reasonable doubt, you would have to be found not guilty.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You are eligible for probation for this offense. You're aware of that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In order for the Court to grant probation, you would have to have a psychosexual evaluation and found to be not a high risk to reoffend.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you're convicted of this offense, you would be required to register as a sex offender.

Are you aware of that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The Court would also be required to impose lifetime supervision.

Are you aware of that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is restitution an issue in this case?

MS. BRANTINGHAM: No.

THE COURT: The Court can consider if the Court accepts your plea at the time of sentencing information regarding charges that were not filed, charges that have been dismissed or charges that will be dismissed.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you're found guilty of this offense, you will be ordered to pay a $25 administrative

assessment fee.

Are you aware of that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you been promised or assured any particular sentence by anyone?

THE DEFENDANT: No, your Honor.

THE COURT: Or probation by anyone?

THE DEFENDANT: No, your Honor.

MR. MURPHY: I will clarify that, in going through the plea agreement, depending on whether Mr. Counsil gets probation or not, there's a definite term of life with the possibility of parole after 15 years are served.

There is no argument as to how 40 percent will advise or anything like that so I did make the representation to him that the Court can only impose that sentence.

THE COURT: And that is the sentence that is available in this case. It's the one single sentence or sentence, excuse me. It is prison for life with the possibility of parole with eligibility for parole beginning when a minimum of 15 years has been served.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you're not a citizen of the United States, a conviction for this offense could result in your

being deported, excluded admission to the United States or denied naturalization.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you're not a citizen of the United States, you should assume the worse that if you're convicted of this offense you will be deported, excluded admission to the United States and denied naturalization.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you want any additional time to speak with an immigration attorney?

THE DEFENDANT: No, your Honor.

THE COURT: If I accept your plea, the Division of Parole and Probation will prepare a presentence investigation report. That report will include background information regarding you, your criminal history. It may contain the statements of other persons.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You and your attorney will be allowed to comment on the presentence -- the contents of the presentence investigation report if your plea is accepted.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: There are four possible pleas that a person can enter in a criminal case. Not guilty. Guilty which means you admit all the facts necessary for the conviction. Guilty, but mentally ill or with the consent of the court, nolo contendere which is not an express admission of guilt but authorizes the Court to treat your, to treat you as if guilty for the purpose of sentencing.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I have a memorandum of plea negotiation that was filed this morning.

Do you have a copy of that in front of you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: On page 8 of the agreement, is that your signature?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did Mr. Murphy go over in detail with you the contents of the memorandum of plea negotiation?

THE DEFENDANT: Yes, Your Honor.

MR. MURPHY: And if I -- I'm sorry to interrupt, I know it's not my job to make the record here, however I did go into the jail yesterday and I read the entirety of the Third Amended Criminal Information in the memorandum plea

negotiation with Mr. Counsil so I read it verbatim to him.

THE COURT: Is there a reason that you read it to him as opposed to him reading it himself?

MR. MURPHY: Because sometimes that's the just way I do it because sometimes there's legal terminology that's difficult to understand. I have a process by which I go through various parts of the plea agreement to make sure that person understands it.

I know -- I pause at certain points to make sure that person understands it, that way they don't get overwhelmed or forget questions they may have during the process.

THE COURT: Is that accurate, Mr. Counsil?

THE DEFENDANT: Yes, Your Honor. And also the day before that I was given a hard copy of both documents to read personally and I have read them before he had come to see me as well.

THE COURT: And the documents that you are talking about are the Third Amended Criminal Information and the memorandum of plea negotiation?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So you have read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has Mr. Murphy answered any questions

you have about the plea agreement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you understand everything in the plea agreement before you signed it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Murphy, does it appear to you that he did understand the contents of the plea agreement.

MR. MURPHY: Yes.

THE COURT: Before he signed it?

MR. MURPHY: Yes.

THE COURT: The plea agreement indicates you are going to plead no contest. At sentencing both parties will be free to argue for the legally appropriate sentence and to present evidence to support their recommendations.

This includes being free to argue for or against probation. If you are certified as not representing a high risk to reoffend under NRS 176A.110, in addition the State specifically allows you to reserve the right to appeal any decisions made by the Court and any pretrial motions in this case.

The State will dismiss Case Number 19-CR-742 1C wherein you are charged with possession of a dangerous weapon by a prisoner. All other charges pending are available as a result of these specific episodes of criminal conduct will be

dismissed or not pursued.

Specifically the State will not file any new criminal charges related to disclosures made by victim L.S. in her interview given on July 21, 2022, in Carson City, Nevada.

Is that the agreement that you've made with the State?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You give up certain constitutional rights if you enter a plea of no contest. And those are, a summary of those are contained in the memorandum of plea negotiation.

Did Mr. Murphy go over those with you in detail?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'm going to go over them with you again. You have a right against self-incrimination which means you could not be forced to answer any questions.

It also means if we proceeded to a trial and you decided for any reason not to testify at the trial the fact that you did not testify could not be used against you in any way. The State would not be allowed to comment on that and the jurors would not be allowed to think about that for any reason.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: On the other hand, you have a right to testify. If we had a trial and you wanted to testify you would be allowed to.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have a right to a public and speedy trial by an impartial jury free from excessive pretrial publicity.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have a right to be represented by an attorney throughout the trial. If you couldn't afford one, one would be appointed for you at no expense to you.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have a right to confront and cross-examine the witnesses against you. If we had a trial, the witnesses would testify here in your presence and your attorney would be able to cross-examine them.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have a right to call witnesses in your own defense. If you had witnesses you wanted to come in and testify for you that did not want to come in, Mr. Murphy

could obtain subpoenas which are court ordered requiring those persons to appear in court and testify.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: By pleading no contest, you give up your right to appeal the conviction unless there are reasonable constitutional, jurisdictional or other grounds challenging the legality of the proceedings, or -- and, I should say, not or, and if you appeal any of the Court's rulings in the case and that appeal is granted, then he's going to be allowed to withdraw his plea; is that the understanding?

MR. MURPHY: It will be based on the ruling that's handed down by the Supreme Court as to what the proper remedy would be.

THE COURT: So can you expand on that for both him and me?

MR. MURPHY: Well, depending on what happens with the rulings that are going to be ruled upon, if the Court grants it, but says we agree this should have happened a different way, however we find that it's harmless error or something of that nature, we will have to deal with the ruling of the Supreme Court at the time and additionally have a discussion with Mr. Counsil as to what the supremes feel --

order the appropriate remedy to be versus whether it's in his best interests to ask to withdraw his plea.

We don't know what -- there are too many variables there that we can't predict at this time.

THE COURT: Anything, Miss Brantingham, you want to say on the record for that?

MS. BRANTINGHAM: I would agree with Mr. Murphy. What happens after an appeal if an appeal should be successful would be based on the ruling of the Supreme Court at the time.

THE COURT: Should there be any additional language added so that that -- I mean, it's not very clear, because first of all we don't know what appeal might be made. We don't know what the result of any appeal might be, but this doesn't indicate that he maybe able to withdraw his plea if something.

MS. BRANTINGHAM: Well, NRS 174.035 is the statute that talks about that. So that's in there. It's covered explicitly by statute.

But in addition to that, it's not -- from the State's perspective, it's not a withdrawal of plea situation. He's reserving the right to challenge the Court's rulings in the Supreme Court and the Supreme Court would then be the determiner of whether the Court's rulings were proper and if not, what the remedy would be. I think all parties are in

agreement as to that piece.

MR. MURPHY: And we would have to have a discussion because depending on what the consequence of the ruling was, it may or may not be in Mr. Counsil's best interests to try to withdraw the plea. Because we have to be careful about what we ask for from the supremes, because we don't want to ask for the ability to withdraw his plea with a potential of a charge being reinstated that's more punitive than what he's pleading to now.

THE COURT: Okay. Have you understood, Mr. Counsil everything that we've gone over in the last couple of minutes about the provision in the plea agreement that you have, that you reserve the right to appeal any decisions made by the Court?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you want to still proceed with your plea today?

THE DEFENDANT: Yes, Your Honor.

THE COURT: By pleading no contest, you do not give up your right to appeal the specific sentence. Even though there's a sentence, only one sentence established by the statute, you're not giving up your right to appeal the specific sentence. There is an opportunity for probation, if that's denied you could appeal that.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you want to appeal the specific sentence you need to let Mr. Murphy know as soon ass after sentencing as possible. There's a limited window of when a window could be filed. If it's not filed in that time, you lose your right to appeal.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you understood all of those rights as I have gone through them?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You are not forced to enter a plea of no contest. You've entered into this agreement. The State has made certain promises in exchange for your agreement to plead no contest, but you can still -- and if you plead no, if you don't plead no contest, then the State is not bound by those promises, but you still do not have to enter a plea of no contest or a guilty.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you understood everything that's gone on this morning?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions or concerns you want to speak with Mr. Murphy or ask me?

THE DEFENDANT: No, your Honor.

THE COURT: You hesitated. Is there something --

THE DEFENDANT: I just wanted to think it through thoroughly as quickly as possible.

THE COURT: Okay.

THE DEFENDANT: But still thoroughly.

THE COURT: I missed the very last part of what.

THE DEFENDANT: And still thoroughly. I don't feel it was a hesitation, more it's --

THE COURT: Okay.

THE DEFENDANT: -- as true consideration.

MR. MURPHY: And if it pleases the Court, when we were having discussion with Mr. Counsil as to how to conduct himself during the canvass, we instructed him that it's going to be a very intensive canvass and to think before he answers.

THE COURT: That's a very good idea and a very good suggestion. But you're comfortable with everything that's gone on so far?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is there anything else that I should know about you that I haven't asked about?

THE DEFENDANT: Not that I can think of, Your

Honor.

THE COURT: Do you have any doubt or hesitation about the plea that you want to enter?

THE DEFENDANT: Very slight, because I know psychologically for myself, there may be a what if question in the back of my mind possibly for the rest of my life, but I feel as things have been explained to me and as my understanding of statistically how these cases play out when gone to trial, I truly feel that this plea agreement is in my best interest.

THE COURT: The Amended Information, Third, excuse me, Third Amended Criminal Information charges you with child sexual abuse or exploitation causing substantial mentally harm, a child under 14, a category A felony.

How do you plead to that charge?

THE DEFENDANT: I plead no contest, Your Honor.

THE COURT: Has anyone threatened, coerced, pressured you to enter a no contest plea?

THE DEFENDANT: No, Your Honor.

THE COURT: The law allows a person to plead no contest, that is not an express admission of guilt, but I said, I told you earlier that that authorizes the Court to treat you as guilty for purposes of sentencing.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The law allows a person to plead to an offense, no contest to an offense if there is a factual basis for the plea.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Miss Brantingham, will you please state a factual basis for the plea.

MS. BRANTINGHAM: Your Honor, yes. So I kind of been thinking how I want to address this. There is a -- there is a factual basis for the charge to which he's pleading guilty.

The substantial mental harm piece we did not raise in the underlying case, we did not bring the victim's mental state into the litigation as the Court's aware there were protection orders issued to prevent the disclosure of medical records.

We didn't disclose any witnesses to testify to the mental harm piece. And I think had we taken a different path, I think there is evidence that there -- there certainly was a factual basis for the underlying charges which were the forensic interviews given by the children which in and of themselves are sufficient for conviction under the law but we did have other corroborative evidence and witnesses who would

have testified to the five counts in the original complaint.

Many of those allegations are incorporated into the child sexual abuse or exploitation charge. It would be the same evidence as to that. The only difference would be the substantial mental harm piece.

And again, I do believe had we gone to trial and had we chosen to make the victims' mental states an element, we would have been able to present sufficient evidence to show substantial mental harm but we didn't go down that road with the original criminal information.

THE COURT: Mr. Murphy.

MR. MURPHY: If it please the Court, in the course of negotiations as Mr. Counsil stated to the Court and as with the information I did provide Mr. Counsil, the standard of proof is if you have a -- well, I gave him all that. If you have a believable witness and there is some particularity as the description of the charges, that will sustain a conviction on appeal.

So statistically speaking that would be what the State would have to prove or would have to show and the probability of trying to challenge the sufficiency of the evidence on appeal is -- has a very low of probability of success.

Based on that, Mr. Counsil, based on the original

charges facing multiple counts of sexual assault on a person under 14 and multiple -- or two counts of lewdness and an attempted sexual assault and which carries a -- which carry 35 to life on the sexual assault on a person under 14.

So in the event that the State just got one conviction out of one of the six charges that was a much more punitive result than this. So I went to the DA -- approached the DA with the idea of can we resolve with this 200.508 resolution with the -- knowing that they had not proved substantial mental harm, however it was a sentence that the State was receptive to and Mr. Counsil was receptive to and it also was as close the charges we could get to satisfy that sentence.

THE COURT: All right, thank you. Are you pleading no contest to this, Mr. Counsil because you think it is in your best interests?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I think we touched on that before. But will you tell me again why you think it's in your best interest?

THE DEFENDANT: Because from how it's been explained to me, the burden of proof as far as what is accepted as evidence in a trial, I feel that I have very little chance of proving my innocence based on what is needed

to prove my guilt, and I very strongly believe that a 15 to life sentence is way more beneficial and less harmful than possible consecutive 35 to life charges.

THE COURT: Mr. Murphy, any other reasons this is in his best interests.

MR. MURPHY: I completely agree with that. That was a conversation we had as to what the benefits and consequences of going to trial versus taking this agreement and again, with these standard of proof and the sufficiency of evidence as it would be reviewed by an appellate court.

As I already stated, if there is a believable witness and they actually describe a particularity, then that is enough to sustain the conviction based on the analysis of the existing evidence and the risk is too great to go to trial on this.

THE COURT: Miss Brantingham, anything you want to say on that point?

MS. BRANTINGHAM: Nothing in addition to that.

THE COURT: Mr. Murphy, do you believe that Mr. Counsil understands all of his constitutional rights?

MR. MURPHY: I do.

THE COURT: That he knowingly, freely and voluntarily waives those rights?

MR. MURPHY: Yes.

THE COURT: Do you think that that is the case, Mr. Counsil?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That he knowingly, freely and voluntarily waives those rights?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The Court finds that the Defendant understands the charge against him, the possible sentence. That he understands his constitutional rights knowingly, freely and voluntarily waives them. The Court accepts his plea.

Any idea on how long to get a psychosexual?

MR. MURPHY: I do have an order, since this is something that is required by the Court, this is something that I do separately.

If I may approach the Court I do have an order including funds for psychosexual evaluation.

THE COURT: Is this for someone in particular?

MR. MURPHY: Yes it's for Dr. Herbert Coard.

THE COURT: Any idea how long?

MR. MURPHY: No. But I would ask for the sentencing to be set out a minimum of two months in the future. That way Mr. Coard can get the evaluation. We have to share the evaluation with the Court and the DA and what I

was going to ask for is that sentencing be set on maybe a Friday afternoon. This is going to be a multi-hour sentencing based on the evidence that needs to be presented for sentencing as well as victim testimony.

So I -- we're not going to be able to do this during the regular law and motion, so of course we can work with chambers to find availability, but I'm thinking maybe the beginning of November.

THE COURT: It's going to take me a second. I want to go ahead and see if we can get it set right now while you're both here.

MR. MURPHY: All right.

THE COURT: So we're looking first part of November.

MS. BRANTINGHAM: I have a jury trial from the 1st through the 10th and then I believe the 11th is a holiday.

MR. MURPHY: The 1st through the 10th, is that a, what's his name.

THE COURT: Navah.

MS. BRANTINGHAM: Navah.

MR. MURPHY: Oh, that's right.

MS. BRANTINGHAM: I think the 18th might work though. Oh, you know what, I take that back because I'm out of town from the, the 17th through December 5th.

THE COURT: And then we head in the holidays. So I'm going to go the other way just a little bit to see October 11th is about two months out. That is a Tuesday. There are a couple of, there's three trials, two criminal and one civil case, but nothing criminal any way set the afternoon of the 11th.

What about that?

MR. MURPHY: I'm fine with that setting. If something that happens that we're just not able to do on there, you know, we will know plenty ahead of time and we can always ask to reschedule.

THE COURT: Miss Brantingham.

MS. BRANTINGHAM: I think that's fine. I think the criminal trials are Mr. Murphy's and mine any way.

THE COURT: One is Rudnicki and one is (indiscernible).

MR. MURPHY: And they're both mine.

THE COURT: Okay. The then there's a civil personal injury case set there and it is set for Tuesday afternoon, but I think we should be able to get that done in a quarter day, so...

How much did you say? You want the whole afternoon 2 to 5?

MR. MURPHY: Yes, please.

THE COURT: Is that enough time?

MS. BRANTINGHAM: I think that's enough time and I would request the same setting 2 to 5.

THE COURT: The sentencing is set for October 11, 2022, from 2 to 5 and you notify the Division; is that right? Okay.

MR. MURPHY: And I also have the P&P paperwork. I received it at one time somehow so I can print it out and provide it to Mr. Counsil. I now keep it because of situations like this when P&P isn't in the room.

THE COURT: I was thinking that P&P made the arrangements for the psychosexual; is that not accurate?

MS. BRANTINGHAM: I can't remember. They do. I think they do if it's a felony, but they don't if it's a gross misdemeanor. This being a felony, they probably would make the arrangements.

THE COURT: Okay.

MS. BRANTINGHAM: But I don't get in the middle of that, so...

MR. MURPHY: Yeah.

THE COURT: Go ahead.

MR. MURPHY: This is something that's required by the Court, we're expediting the process. I know P&P is so backed up, they are having -- you know, I'm getting PSIs the

day before sentencing.

So in order to keep things moving and to have somebody you know is qualified to do these orders and so we're taking the initiative to get these things done.

THE COURT: I've signed the order. So anything else on this, Miss Brantingham, today?

MS. BRANTINGHAM: No, your Honor.

THE COURT: Mr. Murphy.

MR. MURPHY: No, your Honor, thank you.

THE COURT: The trial date and the associated hearings are vacated. The order is on the top and the Court will be adjourned. Thank you.

MR. MURPHY: Thank you.

MS. BRANTINGHAM: Thank you.

(Proceedings concluded at 11:34 a.m..)

STATE OF NEVADA,)
) ss.
CARSON CITY.)

I, SHELLIE LOOMIS, do hereby certify:

That on August 8, 2022, a change of plea hearing was held in the within-entitled matter in the First Judicial District Court, State of Nevada;

That said sentencing hearing was recorded on JAVS CD-ROM, and said JAVS CD-ROM was delivered to me for transcription;

That the foregoing transcript, consisting of pages 1 through 38, is a full, true and correct transcript of said recorded JAVS CD-ROM performed to the best of my ability under the circumstances.

Dated at Carson City, Nevada, this 28th day of September, 2023.

//Shellie Loomis//
Shellie Loomis, RPR

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459-476

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