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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,	Plaintiff,	<b>MOTION TO PREVENT THE STATE FROM MAKING IMPROPER COMMENTS DURING OPENING AND CLOSING STATEMENTS</b>
vs.		
MARTIN J. MACNEILL,	Defendant.	CASE NO. 121402323 JUDGE SAMUEL D. MCVEY

Defendant, MARTIN J. MACNEILL, by and through his counsel, RANDALL K.

SPENCER and SUSANNE GUSTIN, submits the following **MOTION TO PREVENT THE  
STATE FROM MAKING IMPROPER COMMENTS DURING OPENING AND  
CLOSING STATEMENTS.**

## **STATEMENT OF FACTS**

1. Martin MacNeill (hereinafter “MacNeill”) is charged with the murdering his wife, Michele MacNeill.
2. MacNeill found Michele unconscious in the bathtub of their master bath. Michele was pronounced dead at the emergency room on April 11, 2007.
3. In April and September of 2007, the police officers advised Dr. Frikke (the original medical examiner) that MacNeill may have had something to do with Michele’s death, but Dr. Frikke still reported the manner of death to be by natural causes. Dr. Frikke later died.
4. In September of 2008, the state asked Dr. Grey (Chief Medical Examiner of Utah) to change the cause and manner of death. Dr. Grey, declined to change the cause and manner of death and indicated that there was abundant evidence to support Dr. Frikke’s conclusions.
5. In 2010 after numerous additional communications from the State, Dr. Grey changed the manner of death to undetermined, and changed the cause of death to heart disease, myocarditis and drug toxicity.
6. In November of 2011, the Utah County Attorney’s Office hired Dr. Joshua Perper, a forensic pathologist from Florida.
7. Based on review of the original autopsy report and other information supplied to him, Dr. Perper came to his own conclusion regarding the cause and manner of death.
8. All three medical examiners relied to a large degree on microscopic slides of tissue samples from Michele’s body in reaching their determinations regarding the cause of death.
9. Michele’s body was thoroughly examined and relevant tissue samples preserved for not

only Dr. Frikke, but other medical examiners to examine Michele's body in relation to reaching conclusions regarding the cause of Michele's death.

10. Based on material that has been disclosed to counsel and comments made by prosecutors at the preliminary hearing, counsel for MacNeill is concerned about prosecutors making improper statements during MacNeill's trial.

11. The UCAO has argued that this case is like a "no-body" case.

12. However, in the present case, there was a body, and a full autopsy was performed.

13. Additionally, based on the apparent emotional involvement of the UCAO in the present case, MacNeill fears that the UCAO will make comments during the trial that will improperly invoke the jury's passions.

### **ARGUMENT**

A prosecutor's "suggest[ion] to the jury that they consider and `deliberate' matters outside the evidence" constitutes prosecutorial misconduct. *State v. Troy*, 688 P.2d 483, 486 (Utah 1984). *See State v. Hopkins*, 782 P.2d 475, 478 (Utah 1989) ("[C]ounsel is precluded from arguing matters not in evidence."); *State v. Palmer*, 860 P.2d 339, 344 (Utah Ct. App.) ("A comment by a prosecutor during closing argument that the jury consider matters outside the evidence is prosecutorial misconduct."), *cert. denied*, 868 P.2d 95 (Utah 1993). Arguing to the jury that the present case is like a "no-body" case would be suggesting to the jury that some murder convictions have occurred even without a body, and therefore, the jury should consider the uncertainties of "no-body" cases in evaluating the present case. Such an argument by the prosecution is improper because Michele's body was examined immediately after her death, a


full autopsy was done, and a cause of death was certified by the Utah State Medical Examiner. As Dr. Grey put it, due to the smoke in the case, he later amended the cause and manner of death in part, but that does not change the fact that there was a body in this case that was thoroughly examined. Prosecution argument that this case is like a “no-body” case would be misleading and improper, and MacNeill respectfully requests the Court to order the prosecution to refrain from such comments.

The Utah Court of Appeals addressed the impropriety of a prosecutor invoking the passions in *State v. Todd*, 2007 UT App 349. In *Todd*, the Court emphasized that “the prosecution’s responsibility is that of ‘a minister of justice and not simply that of an advocate,’ which includes a duty ‘to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.’” *Id.* at ¶17 quoting *State v. Hay*, 859 P.2d 1, 7 (Utah 1993).

Comments from a prosecutor asking jurors to put themselves in the victim’s place, or references to the victim never being able to see her children again, or comments about what the victim would say if she were alive or similar comments were identified in *State v. Todd* as improper. The present case is not only susceptible to improper passion-invoking comments from theUCAO related to Michele’s death, but also related to MacNeill’s affair with Gypsy Willis. TheUCAO should be instructed to not make comments about the immorality of MacNeill having an affair with Gypsy while married to Michele or other similar comments designed to not only invoke the jury’s passions, but inflame the jury against MacNeill for cheating on his wife.

MacNeill respectfully requests the Court to enter an order in limine preventing the prosecution from making improper comments about facts not in evidence such as analogizing this case to a “no-body” case, and other comments improperly invoking the jury’s passions.

Submitted this 20th day of August, 2013.



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Randall K. Spencer  
**Fillmore Spencer LLC**

**CERTIFICATE OF DELIVERY**

I hereby certify that I caused to be delivered by United States Mail, the forgoing Motion  
in Limine to:

CHAD GRUNANDER  
SAM PEAD  
JARED PERKINS  
Deputy Utah County Attorney  
100 East Center, Suite 2100  
Provo, Utah 84606

Dated this 20th day of August, 2013.

