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1	IN THE SUPREME COURT OF THE STATE OF NEVADA
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3	ROBERT JAMES DAY,) No. 38028
4	Appellant,
5	vs. FILED
6) E Los hos hof THE STATE OF NEVADA,)
7	Respondent.) JAN -3 2002
8) CLERK OF SUPREME COURT BY
9	DEPUTY CLERK
10	Petitioner, Robert James Day, by and through his attorney,
11	DIANNE M. DICKSON, Deputy Public Defender, hereby petitions this
12	Honorable Court pursuant to Rule 40, Nevada Rules of Appellate
13	Procedure, for rehearing in the above-entitled cause on grounds that
14	the decision entered in the instant case was based on an
15	unreasonable determination of the facts in light of the evidence
16	presented at trial.
17	In this Court's decision entered November 15, 2001, it
18	appears that the Court has determined that the in-court
19	identification was not tainted as a result of the witness being
20	given a photograph of Appellant prior to trial since the witness had
21	identified Appellant at the one-on-one confrontation prior to having
22	been given the photograph. (See, "Order Affirming in Part and
23	Remanding in Part)
24	However, since nowhere in the record of these proceedings
25	has it ever been established what level of certainty (if any) the
26	witness exhibited at this confrontation, it is not known whether
27	the Eden Eifficien was "tentative" or "positive" or whether the
28	witness in court identification was a result of being given the
	JANETTE M. BLOOM CLERK OF SUPREME COURT DEPUTY CLERK

1 photograph.

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2 without knowing what level of certainty was Thus. 3 exhibited by the witness at the time of the one-on-one 4 confrontation, it can only be <u>assumed</u> that the photograph did not 5 influence the in-court identification, and there is no basis in fact 6 to support that conclusion.

ARGUMENT

8 In Banks v. State, 94 Nev. 90, 96 575 P.2d 592, 596 9 (1978), this Court cited favorably the standards established by the 10 United States Supreme Court in Manson v. Braithwaite, 432 U.S. 98 11 (1977), which sets forth the factors to be considered in determining 12 whether identification has sufficient or not in-court an 13 reliability:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior the criminal, <u>the level</u> of description of certainty demonstrated at the confrontation, between the crime and the the time and Against these factors is to be confrontation. weighed the corrupting effects of the suggestive identification itself.

19 Manson, supra, at 114 (emphasis added.)

In the instant case, it appears that this Court had determined this issue without considering all the "factors" as set forth in <u>Manson</u>, <u>supra</u>, and as reiterated in <u>Banks</u>, <u>supra</u>. Without knowing "the level of certainty demonstrated at the confrontation" it cannot be said that the photograph did not influence the in-court identification.

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CONCLUSION

Appellant asserts that the in-court identification was impermissibly tainted by the pre-trial identification procedure and

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1 that this Court's conclusion that the photograph did not effect the 2 reliability of eyewitness identification is unfounded as there is 3 nothing in the record to show what level of certainty the eyewitness 4 exhibited prior to receiving the photograph of Appellant. Thus, 5 Petitioner prays that this Honorable Court will grant his Petition 6 for Rehearing to consider this matter. 7 MARCUS D. COOPER CLARK COUNTY PUBLIC DEFENDER 8 9 By 10 Μ. DICKSON NEVADA BAR #5620 11 DEPUTY PUBLIC DEFENDER 309 SOUTH THIRD STREET, SUITE #226 12 LAS VEGAS, NEVADA 89155-2610 (702) 455-4685 13 14 15 16 17 18 19 20 21 22 RECEIPT OF A COPY of the foregoing Petition for Rehearing 23 is hereby acknowledged this cembe 200**(**. day of 24 STEWART L. BELL CLARK COUNTY DISTRICT ATTORNEY 25 26 lat ane 27 28

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