IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIERRA JONES, DISTRICT JUDGE

Respondent,

and

JOHN EUGENE DOANE,

Real Party in Interest.

CASE NO:

D.C. NO: C-20-346036-1

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIERRA JONES, DISTRICT JUDGE Respondent, and JOHN EUGENE DOANE, Real Party in Interest.	CASE NO: D.C. NO: C-20-346036-1

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

State's Petition for Writ of Mandamus or Prohibition from Denial of State's Motion to Reconsider State's Motion to Admit Evidence of Other Crimes (Pre-trial)

ROUTING STATEMENT

Pursuant to NRAP 17(b), the Supreme Court may assign this case to the Court of Appeals.

RELIEF REQUESTED

The State requests that this Court vacate the district court's arbitrary and capricious decision to deny the State's Motion to Reconsider State's Motion to Admit Evidence of Other Crimes and to permit the State to admit evidence of Respondent's prior conviction in 79C044644.

STATEMENT OF THE ISSUES

1. The district court manifestly abused its discretion or acted arbitrarily or capriciously when it found that there was no sexual assault or attempted sexual assault allegation based on the district court's interpretation of the evidence for purposes of admitting evidence related to Respondent's prior conviction in 79C044644.
2. The district court manifestly abused its discretion or acted arbitrarily or capriciously when it found that admitting Respondent's other crime to further the State's theory results in unfair prejudice that substantially outweighs its probative value pursuant to NRS 48.045(3).

STATEMENT OF THE CASE

Respondent John Eugene Doane is charged by way of Criminal Indictment with Murder (Category A Felony – NRS 200.010, 200.030). 1 AA 114–115. Respondent has been charged under a willful, deliberate, and premeditated theory as well as a felony murder theory where the murder occurs during the perpetration or attempted perpetration of a sexual assault. Id. The victim was C.L. Id. The murder occurred on or about November 26, 1978. Id.

On February 4, 2020, Respondent appeared for initial arraignment and pled not guilty. 1 AA 117. Respondent waived his right to a speedy trial. Id.

On July 29, 2021, the Stated filed a Notice of Motion and Motion to Admit Evidence of Other Crimes ("Motion"), seeking to present evidence related to Respondent's conviction in 79C044644 under NRS 48.045(2) or 48.045(3). 1 AA 118. On August 5, 2021, Respondent filed an Opposition. 1 AA 222. The Court heard the Motion on August 20, 2021 and took the matter under advisement. 1 AA 247.

On August 23, 2021, Respondent filed a Motion to Continue Trial. 1 AA 248. The State did not file an opposition. On September 8, 2021, the Court granted Respondent's Motion to Continue Trial. 2 AA 253. Respondent's jury trial is currently set for April 25, 2022. 2 AA 253.

On October 5, 2021, the Court issued a Minute Order denying the State's Motion. 2 AA 254. On October 22, 2021, the Court filed its Findings of Fact, Conclusions of Law and Order. 2 AA 256.

On October 28, 2021, the State filed a Notice of Motion and Motion to Reconsider State's Motion to Admit Evidence of Other Crimes ("Motion to Reconsider"). 2 AA 265. The State pointed out to the district court that Respondent was charged with Murder pursuant to NRS 200.030, and one of the theories of liability is that the murder occurred in the perpetration or attempted perpetration of

a sexual assault.[1] 2 AA 265. On November 8, 2021, Respondent filed an Opposition. 2 AA 270. On November 12, 2021, the Court heard and denied the Motion to Reconsider. 2 AA 277. On November 17, 2021, the district court filed its written Order. 2 AA 283.

The State now brings the instant Petition for Writ of Mandamus, or in the alternative, Petition for Writ of Prohibition, and respectfully requests that this Court reverse the district court's denial of the State's Motion to Reconsider.

STATEMENT OF THE FACTS

A. The Facts of the Instant Case

On November 26, 1978, at approximately 10:45 a.m., the body of fourteen (14) year old C.L. was discovered in what was then a desert area near Vegas Valley Drive and Hollywood Boulevard in Clark County, Nevada by two (2) young men riding their motorbikes. 1 AA 237, 241. C.L. was found lying face down in the dirt and she appeared to have a black eye. 1 AA 239. She was fully clothed; however, her underwear was found at some distance away from her body. 1 AA 239. Her shoes were similarly found in the desert area near her body. Id.

On November 26, 1978, Medical Examiner Dr. Sheldon Green performed an autopsy and found that C.L. had a black eye and numerous hemorrhages on the top

[1] The State did not charge sexual assault separately due to the expiration of the twenty (20) year statute of limitations. NRS 171.085(1).

of her skull. 1 AA 246. There was one hemorrhage on the top middle part of her skull, and one to the left side of the head with numerous small hemorrhages around it. Id. The report reflected that "these did not appear serious and were not visible through the victim's hair, however, [it] appeared that she was struck with some type of object." Id.

Dr. Green did not observe any injuries consistent with sexual assault. Id. A vaginal swab was taken, and Dr. Green noted that it appeared to be dry, indicating that C.L. had not had sexual relations. Id. The cause of death was found to be manual strangulation. Id.

Interviews of C.L. 's family and friends indicated that C.L. had visited various friends' homes over the weekend. 1 AA 241–44. Starting on Friday November 24, 1978, she visited the home of her friend Tamara Bivens and left at around 12:30 p.m. AA 243. At around 4:30 p.m., Tamara received a phone call from a girl she believed to be C.L., disguising her voice and saying something about "in the desert." 1 AA 244.

Later that night, from approximately 9:00 p.m. until 3:00 a.m. the next morning, C.L. was at the home of her boyfriend Albert Biggs. 1 AA 241. At around 3:00 a.m., Biggs' mother woke up and drove C.L. to her friend James Brown's home, where C.L. represented that she lived. Id. Sometime around 3:00 a.m., James Brown's mother heard a knock on the door and at the window. 1 AA 242. When she

went to the window, she saw C.L. duck down. Id. By the time her son came to the door, C.L. was gone. Id.

James Brown told police that he received a call from C.L. at approximately 8:00 a.m. that Saturday morning. Id. She told him that she had some acid in her possession and that she wanted to buy him a stereo for his car. Id. That was the last contact he had with C.L. Id.

That same day, C.L. 's mother contacted family friend John Bivens, because C.L. had not returned home, and she feared that C.L. had run away again. 1 AA 243. John Bivens and his wife Dee contacted C.L. 's friends but could not locate her. Id. He continued to search for her from approximately 8:00 p.m. that night until 2:30 a.m. in the morning Id. When he could not locate her, he told her mother to contact the police. Id.

C.L. 's killing remained a cold case until police tested her underwear for DNA evidence in 2016. 2 AA 258. In 2019, the Las Vegas Metropolitan Police Department (hereinafter "Metro") reported a CODIS hit for Respondent. 1 AA 78. Respondent had been in prison since 1979, however, his DNA sample was not collected for CODIS entry until late 2018. 1AA 32.

Crime Scene Analysts at Metro's crime lab analyzed C.L. 's underwear, her shoes, and the vaginal swab that had been taken during the autopsy. 1 AA 16–20. Respondent's DNA was found on the waistband of C.L. 's underwear. 1 AA 69. In

addition, his sperm and epithelial cells were found in the crotch area of her underwear. 1 AA 73–74. Respondent's DNA was also found on swabs taken from her shoes. 1 AA 75.

C.L. 's vaginal swabs were tested and tested positive for sperm and semen. 1 AA 20. Although there was sperm present in the vaginal swabs, forensic analysts were unable to obtain a useable DNA profile. 1 AA 76.

During the Grand Jury proceedings, Medical Examiner Dr. Jennifer Corneal testified that she had been asked to review the autopsy of C.L. 1 AA 92–93. Dr. Corneal concluded that C.L. had died by strangulation. 1 AA 94. Although she died by strangulation, C.L. also had scratches on her nose, a black eye, and hemorrhaging on the scalp consistent with blunt force trauma. 1 AA 96. Dr. Corneal agreed that merely because there were no physical findings associated with sexual assault, this does not mean that a sexual assault did not occur. 1 AA 97.

B. The Facts of Respondent's Other Crime Under Case No. 79C044644

On February 20, 1979, fourteen (14) year old C.P. stopped at a Safeway and then at a park for a few minutes on her way to school. 1 AA 148. While sitting in the park a man, later identified as Respondent, approached her, and stated that he was looking for a man named "Rick." 1 AA 150. C.P. stated that she had not seen anyone, and Respondent got back in his vehicle and left. Id.

Respondent approached C.P. again while she was walking up the path to Basic High and asked her if she wanted a ride the rest of the way up to school. Id. She accepted, however, when she told him to stop, he drove past the school. 1 AA 151. Respondent then threatened C.P. with a screwdriver and drove her to a spot in the desert near Lake Mead. Id.

Once there, Respondent sexually assaulted her by inserting his penis into her vagina. 1 AA 152. He then took her to another location where he sexually assaulted her two (2) more times. 1 AA 154. Afterwards, they got back in the vehicle and Respondent threatened C.P. with the screwdriver again and told her that he was going to kill her. Id.

Respondent took her to a third location where he forced her to perform fellatio on him. Id. At some point, C.P. was standing near the vehicle, and he began to choke her. 1 AA 155. C.P. fell to the ground at which point Respondent started forcing dirt and rocks into her mouth. Id. Respondent strangled C.P. until she lost consciousness and struck her in the face with a large rock. Id. Respondent then left her for dead in the desert. 1 AA 130.

C.P. woke up and wandered around until approximately 9:30 a.m. when she was discovered by a park ranger and rushed to the hospital. 1 AA 156. C.P. had numerous bruises and markings around her neck and chest area suggesting strangulation. 1 AA 217. The cheek bone area of the right side of her face was

crushed and she also suffered broken teeth and a permanent injury to the focusing mechanism of her eyes. 1 AA 217. When C.P. appeared for preliminary hearing, her jaw was wired shut. 1 AA 134. C.P. was permanently disfigured as a result of the attack. 1 AA 193.

On August 8, 1979, Respondent signed an affidavit regarding his conduct and acknowledged the conduct in a guilty plea. 1 AA 129–130. On September 14, 1979, Respondent was sentenced to life in prison without the possibility of parole in Case No. 79C044644. 2 AA 259.

C.L. was last seen alive at 1445 Palm Street in Henderson, Nevada approximately three (3) miles from the location where Respondent picked up C.P. 1 AA 150, 241. In addition, C.P. was attacked on February 20, 1979, less than three (3) months after C.L. 's murder. 1 AA 216, 237.

ARGUMENT

I. EXTRAORDINARY RELIEF IS WARRANTED AS PETITIONER HAS NO PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW

"[M]andamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court." Hickey v. Eighth Jud. Dist. Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). However, extraordinary relief will not issue "where the petitioner has a plain, speedy and adequate remedy, such as an appeal, in the ordinary course of law." Id. at 731,

782 P.2d at 1338 (emphasis added); Bradford v. Eighth Jud. Dist. Court, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). Petitioner carries "the burden of demonstrating that extraordinary relief is warranted." Pan v. Eighth Jud. Dist. Court, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); see also NRAP 21(a).

NRS 34.320 states:

> The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person from exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

A writ of prohibition does not serve to correct errors; its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial but not ministerial power. Olsen Family Trust v. District Court, 110 Nev. 548, 551, 874 P.2d 778, 780 (1994); Low v. Crown Point Mining Co., 2 Nev. 75 (1866). However, "a writ of prohibition must issue when there is an act to be 'arrested' which is 'without or in excess of the jurisdiction' of the trial judge." Houston Gen. Ins. Co. v. District Court, 94 Nev. 247, 248, 78 P.2d 750, 751 (1978); Ham v. Eighth Judicial District Court, 93 Nev. 409, 412, 566 P.2d 420, 422 (1977); See also, Goicoechea v. District Court, 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. District Court, 102 Nev. 551, 729 P.2d 1328 (1986).

The court may issue a writ of mandamus to enforce "the performance of an act which the law enjoins as a duty especially resulting from an office . . . or to

compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which he is unlawfully precluded by such inferior tribunal." NRS 34.160.

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). Thus, "[a] writ of mandamus will issue to control a court's arbitrary or capricious exercise of its discretion." Id. (citing Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992)); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-1016 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

A writ of mandamus will issue when the petitioner has no plain, speedy and adequate remedy at law. NRS 34.170. Scrimer v. Eighth Judicial Dist. Court, 998 P.2d 1190, 1193 (2000). It is within the discretion of the court to determine if such writ will be considered. Id.; *see also* State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983). The court may entertain district court denials of motion to dismiss where "no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule." State v. Eighth Judicial District Court ex rel., 42 P.3d 233, 238 (2002).

In this case, the district court manifestly abused its discretion or acted arbitrarily or capriciously when it found that (1) the State's theory that a sexual assault occurred in the instant case is not supported by the evidence for purposes of NRS 48.045(3); and (2) that the probative value of the other crime is substantially outweighed by the danger of unfair prejudice pursuant to Franks v. State, 135 Nev. 1, 432 P.3d 752 (2019). AA 283–284. As the State will explain further, the district court's decision has no basis in fact or law. "[B]ecause the State cannot appeal a final judgment in a criminal case, see NRS 177.015(3), the State has no remedy in law to challenge the district court's evidentiary ruling." State v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 134 Nev. 104, 105–06, 412 P.3d 18, 21 (2018) (citing State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 931, 267 P.3d 777, 779 (2011)). Accordingly, the State has no other plain, speedy, and adequate remedy available at law to address the district court's manifest abuse of discretion in denying the State's Motion to Reconsider. This Court's intervention is warranted to compel the district court to vacate its Order denying the State's Motion to Reconsider and to permit the State to introduce evidence of Respondent's other crime at trial.

II. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT FOUND THAT THE FACTS DO NOT SUPPORT A FINDING THAT A SEXUAL ASSAULT OCCURRED IN THE INSTANT CASE FOR PURPOSES OF NRS 48.045(3).

This Court generally reviews a district court's decision to admit evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 60, 188 P.3d 1126 (2008); see e.g., McLellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) ("We review a district court's decision to admit or exclude evidence for an abuse of discretion.").

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

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

Further, NRS 179D.097(1) (a) defines "sexual offense" as follows:

> 1. "Sexual offense" means any of the following offenses:
> (a) Murder of the first degree committed in the perpetration or attempted perpetration of sexual assault or of sexual abuse or sexual molestation of a child less than 14 years of age pursuant to paragraph (b) of subsection 1 of NRS 200.030.

NRS 179D.097(1)(a).

Here, the State moved to admit evidence of Respondent's sexual assault of C.P. pursuant to NRS 48.045(3). 1 AA 118. In its Order Denying State's Motion to Reconsider, the district court stated in relevant part:

> The Court acknowledges the State's theory that a sexual assault occurred in the instant case but has determined that, for purposes of admitting the sought-after Other Crime, the facts do not support such a finding.

2 AA 283.

There was no basis in fact or law for the district court to find that there is not enough evidence to support the State's theory that a sexual assault or attempted sexual assault occurred for purposes of NRS 48.045(3). Although the framework set out in Franks requires that the State prove the *other act* by a preponderance of the evidence, both Franks and the statute are silent as to any standard of proof the court is to apply to the instant case. NRS 48.045(3); Franks, 135 Nev. at 4, 432 P.3d at 755. The statute merely indicates that the current case must be a "prosecution for a sexual offense" within the meaning of NRS 179D.097, which is clearly met here. NRS 48.045(3). To interpret the statute otherwise would add an additional burden on the State which is not supported by the plain language of the statute or the caselaw. Mendoza-Lobos v. State, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009) ("This court will attribute the plain meaning to a statute that is not ambiguous.") (citing Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004)). Adding this additional step to the Franks framework goes against common sense by forcing the State to prove the very facts at issue prior to trial. Id. ("If a statute is ambiguous, however, 'the Legislature's intent is controlling, and we interpret the statute's language in accordance with reason and public policy.'") (quoting Sheriff v. Witzenburg, 122 Nev. 1056, 1061, 144 P.3d 588, 590 (2004)).

The Grand Jury found probable cause for the charge in the Indictment. 1 AA 114–15; See Dettloff v. State, 120 Nev. 588, 595, 97 P.3d 586, 590–91 (2004) ("A grand jury indictment will be sustained where the State submits sufficient legal evidence to establish probable cause."). Beyond that, the decision of whether C.L. was sexually assaulted is an issue of fact for the jury. Franks, 135 Nev. at 7, 432 P.3d at 757 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.") (quoting Rose v. State, 123 Nev. 194, 202–03, 163 P.3d 408, 414 (2007)). The court's decision to make a ruling on the merits of the case prior to trial in contradiction to the statute and caselaw is the definition of arbitrary, capricious, and a manifest abuse of discretion. See Office of the Washoe County DA, 116 Nev. at 635, 5 P.3d at 566.

Although the district court did not specify which standard of proof it was using to evaluate the instant case, the State submits that it has met any burden that the district court could have applied. C.L., who was just fourteen (14) years old, was found strangled to death in the desert with her underwear away from her body. 1 AA 239. Both her underwear and the vaginal swab taken during her autopsy were positive for semen. 1 AA 73–76. C.L. had a black eye and hemorrhages on her skull that appeared to be from blunt force trauma. 1 AA 96. Although Dr. Green did not observe any injuries consistent with sexual assault during C.L. 's original autopsy, Dr. Corneal agreed at the Grand Jury that in cases of sexual assault, such injuries are

not always present. 1 AA 97. Thus, there is ample evidence that a sexual assault or attempted sexual assault occurred in the present case.

In the alternative, the district court should have found that the evidence was admissible pursuant to 179D.097(1)(r), which states:

> 1. "Sexual offense" means any of the following offenses:
> . . .
> (r) Any other offense that has an element involving a sexual act or sexual conduct with another.

The statute clearly defines sexual offense broadly. Thus, even if the district court found that there was insufficient evidence to support allegations of a sexual assault or attempted sexual assault, the district court should have found that this was an "offense that has an element involving a sexual act or sexual conduct with another." 179D.097(1)(r). Respondent's semen was found in the minor victim's underwear, and his DNA was found on the waistband of her underwear and on her shoes. 1 AA 73–74. This shows that the offense was likely sexually motivated, and the district court should have found that it qualifies as a "sexual offense" under subsection (r).

The court manifestly abused its discretion when it held that the State's theory of sexual assault is not supported by the evidence for purposes of NRS 48.045(3) both because (1) this is not part of the Franks framework, and (2) there was ample evidence of a sexual assault or attempted sexual assault. 135 Nev. 1, 432 P.3d 752

(2019). Accordingly, extraordinary relief is warranted and the State requests that this Court intervene and reverse the district court's decision.

III. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT FOUND THAT THE PROBATIVE VALUE OF THE OTHER CRIME IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

The admission of other bad act evidence is, of course, subject to other provisions of the rules of evidence including NRS 48.025 which provides:

> "1. All relevant evidence is admissible . . ."

NRS 48.035 further provides:

> 1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
> 2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.
> 3. Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

In January of 2019, the Nevada Supreme Court clarified its position regarding NRS 48.045(3). Franks v. State, 135 Nev. 1, 432 P.3d 752 (2019). The Court held that the plain language of NRS 48.045(3) allows the State to admit evidence of a

separate sexual offense for purposes of establishing a defendant's propensity to commit the charged sexual offense. Id. The Court further held that a Petrocelli hearing is not required prior to admission of a prior sexual act for propensity purposes, but that the trial court must be satisfied that the prior act is relevant to the crime charged, proven by a preponderance of the evidence, and weighed to ensure the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Id. All that is required under NRS 48.045(3) is that the trial court make a preliminary finding that the prior sexual offense is relevant for propensity purposes, and that a jury could reasonably find by a preponderance of the evidence that the prior sexual offense occurred. Id. The Ninth Circuit has recognized that propensity evidence in the context of sexual offenses is typically relevant because, "it is generally accepted that a defendant with a propensity to commit acts similar to those charged is more likely to have committed the charged act than another and therefore such evidence is relevant." Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1268 (9th Cir. 2000).

Here, the district court denied the State's motion based on its analysis of the third factor. Not only did the district court provide little or no explanation for its decision, but as the State will demonstrate below, a proper application of the factors set out in Franks and Lemay weighed overwhelmingly in favor of admitting evidence of Respondent's other crime. Franks, 135 Nev. at 1, 432 P.3d at 752; Lemay, 260

F.3d at 1018, 1027-28. Thus, the district court's decision to deny the State's Motion to Reconsider State's Motion to Admit Evidence of Other Crimes was arbitrary and capricious and should be reversed.

A. The Other Crime is Relevant

Here, given the significant similarities between the two (2) cases, evidence of Respondent's sexual assault of C.P. is relevant to show that he also sexually assaulted C.L. Both girls were only fourteen (14) years old. 1 AA 148, 237. C.P. was kidnapped approximately three (3) miles from the location where C.L. was last seen alive. 1 AA 150, 241. The crimes occurred in a relatively short period of time—less than three (3) months apart. 1 AA 216, 237. Both girls were sexually assaulted, strangled, and left for dead in a remote desert location. 1 AA 130, 246. Respondent admitted that he struck C.P. in the face with a rock after he strangled her unconscious. 1 AA 130. Similarly, C.L. had hemorrhages on the top of her head indicating that she had been struck with an object. 1 AA 96, 155, 246.

Thus, evidence of Respondent's other crime is absolutely relevant to show his propensity to target and sexually assault fourteen (14) year old girls. See NRS 48.015 ("'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); Campbell v. State, 485 P.3d 213 (Nev. 2021) (unpublished) ("First, the district court properly found the bad acts

evidence, testimony by two victims of prior lewdness and other sexual abuse, relevant—a low hurdle.") (citing Hubbard v. State, 134 Nev. 450, 460, 422 P.3d 1260, 1268 (2018) ("[P]ropensity evidence is relevant . . . .") (internal quotation omitted)).

B. The Other Crime is Proven by a Preponderance of the Evidence.

Here, the prior act is unquestionably proven by a preponderance of the evidence. On September 18, 1979, Respondent was convicted of Mayhem, Attempt Murder, Sexual Assault with Substantial Bodily Harm and Use of a Deadly Weapon, First Degree Kidnapping with Substantial Bodily Harm and Use of a Deadly Weapon, and Robbery with Use of a Deadly Weapon, in Case No. 79C044644, after he signed an affidavit regarding his conduct and acknowledged the conduct in a guilty plea. 1 AA 129–130; 2 AA 259.

C. The Probative Value is not Substantially Outweighed by the Danger of Unfair Prejudice Under the LeMay factors.

Finally, it was a manifest abuse of discretion for the district court to find that the probative value of Respondent's sexual assault of C.P. was substantially outweighed by unfair prejudice. 2 AA 284. In order to fairly weigh the prejudice prong, the Nevada Supreme Court adopted a balancing analysis set forth by the Ninth Circuit in United States v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001). Franks, 135 Nev. at 1, 432 P.3d at 752. Pursuant to LeMay, a trial court is to consider the

following factors in weighing the probative value of prior sexual conduct against the substantial risk of unfair prejudice:

> (1) The similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of evidence beyond the testimonies already offered at trial.

Franks, 135 Nev. at 6, 432 P.3d at 756 (citing LeMay, 260 F.3d at 1028). The LeMay Court also pointed out that the enumerated factors were not an exhaustive list and that trial courts should consider any other factors relevant to their individual case. LeMay, 260 F.3d at 1028.

In LeMay, the defendant was charged with forcing his five (5) and seven (7) year old nephews to perform oral sex upon him while he was babysitting them. LeMay, 260 F.3d at 1022. During trial, the prosecutor sought to admit evidence that the defendant had previously forced a two (2) year old female cousin to perform oral sex on him, and had likely vaginally penetrated another female cousin, who was an infant at the time of the abuse. Id. at 1023. The defendant was twelve (12) years old at the time of the prior allegations, which had also occurred while he was babysitting, and had been convicted of juvenile rape in the juvenile justice system. Id. The prior allegations occurred eight (8) years before the charged conduct, and approximately eleven (11) years before LeMay's trial. Id.

In this case, the district court found that the probative value of Respondent's sexual assault of C.P. was substantially outweighed by unfair prejudice. 2 AA 284. However, it is clear from the record that this finding was based on the district court's misapprehension of NRS 48.045(3). On November 12, 2021, during the hearing on the State's Motion to Reconsider, the district court stated in relevant part:

> So I understand that is your theory but because of the lack of evidence that actually supports that theory that makes the probative value of this evidence highly more prejudicial then [sic] it is probative because then it allows you to bootstrap the 1979 case in order to say that there was a sexual assault in this case.

2 AA 281. However, as explained *supra*, it was a manifest abuse of discretion for the district court to make a ruling regarding the merits of the instant case. NRS 48.045(3). Further, there is ample evidence showing that a sexual assault or attempted sexual assault *did* occur. 1 AA 73–76, 96–97, 239. Thus, because the district court's analysis of the probative/prejudicial prong was based on its erroneous conclusion that a sexual assault or attempted sexual assault did not occur, this decision should be vacated. Moreover, the factors set out in Lemay clearly weighed in favor of admitting evidence of Respondent's other crime. LeMay, 260 F.3d at 1028.

1. **Respondent's Other Crime is Sufficiently Similar to the Crime Charged in this Case.**

In LeMay, the Ninth Circuit held that there were enough similarities in the two allegations to allow testimony regarding the prior sexual acts. Specifically, the Court was persuaded by the fact that both allegations involved young family members who had been left in LeMay's care. Id. at 1028. The Ninth Circuit was not deterred by the differing ages or genders of the children, or the fact that one of the allegations in the prior case was of a different and highly incendiary nature. Specifically, the mother of the infant in the bad acts case testified that she had found what she believed to be semen in her daughter's vagina after the girl had been left alone with LeMay. Id. at 1023, 1028. The Ninth Circuit was also not persuaded that the testimony regarding the defendant's prior sexual abuse of an eight (8) month old infant was unduly prejudicial in light of the significant probative value of the evidence. Id. at 1028.

Here, as explained *supra*, there are substantial similarities between the two (2) cases. Both victims were fourteen (14) years old. 1 AA 148, 237. C.L. was last seen approximately three (3) miles from where C.P. was kidnapped. 1 AA 150, 241. In both cases, the victims were taken to a remote desert location where they were sexually assaulted, strangled, and left for dead. 1 AA 130, 246. Respondent sexually assaulted C.P. by vaginal penetration multiple times. 1 AA 154. The evidence suggests that C.L. was also sexually assaulted by vaginal penetration, as there was semen found in her vagina and on her underwear. 1 AA 73–76. Although Crime

Scene Analysts were able to determine that it was Respondent's semen on C.L.'s underwear, they were unable to obtain a useable DNA profile from her vaginal swab. 1 AA 73, 76. Respondent's DNA was also found on swabs taken from C.L.'s shoes. 1 AA 75.

In addition, Respondent admitted that he hit C.P. in the face with a large rock after strangling her unconscious. 1 AA 130. Similarly, C.L.'s autopsy report shows that she had been struck in the head with some type of object and she also suffered a black eye. 1 AA 96, 246. Thus, the similarities between the cases is striking. Respondent picked up fourteen (14) year old girls from the same general location and within a relatively short period of time. 1 AA 148, 237. He then took them not just to any isolated location, but specifically into the desert to sexually assault them. 1 AA 130, 246. After the sexual assault, Respondent choked his victims to death or to the point of unconsciousness. Id. Although it is unclear whether C.L. suffered blunt force trauma to her head before or after she was strangled, it is also notable that he beat both of his victims in the head or face with an object. 1 AA 96, 130. Accordingly, the similarities between the acts charged in the instant case and Respondent's sexual assault of C.P. weighed in favor of admitting evidence of Respondent's other crime.

2. Respondent's Other Crime is Sufficiently Close in Time to the Charged Conduct.

In LeMay, the court allowed testimony regarding prior acts of sexual abuse that occurred nearly twelve (12) years prior to trial, when the defendant was twelve (12) years old. LeMay, 260 F.3d at 1022. Despite the prior acts being handled in juvenile court and occurring literally half of the defendant's life earlier, the Ninth Circuit deemed that the acts were appropriately close in time to be relevant for propensity purposes. Id.

Outside the realm of propensity evidence, there is similarly no set rule for how recent a bad act must be in order to remain relevant. For instance, in United States v. Simtob, 901 F.2d 799 (9th Cir. 1990), the Ninth Circuit held that prior drug activity by the defendant ten (10) years previous to arrest on the instant offense was admissible to prove intent. Similarly, in United States v. Ross, 886 F.2d 264 (9th Cir. 1989), the Federal Court of Appeals affirmed the introduction of bad acts evidence that occurred thirteen (13) years previous to the instant offense, and nearly eighteen (18) years before trial. The prior bad acts consisted of evidence that the defendant had similarly used his wife's social security number in a fraudulent manner.

Here, the attack on C.P. and C.L. 's murder occurred less than three (3) months apart. 1 AA 216, 237. Unlike Lemay, where approximately eleven (11) years had elapsed between the prior and current abuse, here, the crimes occurred within months of each other. LeMay, 260 F.3d at 1022. Thus, given the closeness in time and

similarities between the attacks, this factor also weighed in favor of admissibility. See Chaparro v. State, 137 Nev. Adv. Op. 68, 497 P.3d 1187, 1193 (2021) (holding it was not an abuse of discretion for the district court to admit evidence of prior sexual assault where the crimes occurred five (5) years apart).

3. The Frequency of the Acts Weighs in Favor of Admissibility.

In LeMay, both the charged conduct and the prior sexual conduct were one-time incidents, following which the victims had immediately reported the abuse to their parents. LeMay, 260 F.3d at 1022-23. Despite the fact that the abuse took place only one time with each set of victims, eight (8) years apart, the LeMay court determined that the abuse still occurred with enough frequency to support an inference that the abuse was not an "isolated incident." Id. at 1029. In Franks, the victim testified that the defendant had touched her five (5) times total, over a roughly two (2) month period of time. Franks, 135 Nev. at 2, 432 P.3d at 754. Although Franks was only charged with one count, which the victim described as the "last time," the Nevada Supreme Court determined that the other acts occurred with sufficient frequency over a close enough time period to be admissible under NRS 48.045(3). Id.

Here, C.P. was attacked less than three (3) months after C.L. was found murdered. 1 AA 216, 237. As in Lemay, 260 F.3d 1029, where the abuse involved one-time incidents, the attack on C.P. is relevant to show that this was not an isolated

incident, but rather it was part of Respondent's modus operandi of targeting and attacking young girls from the same general area, taking them into the desert, and sexually assaulting them. 1 AA 150, 241. Given that the two crimes occurred less than three (3) months apart, the rate at which Respondent was sexually assaulting young girls weighed in favor of admitting evidence of his other crime.

4. Intervening Circumstances Weigh in Favor of Admissibility.

In LeMay, the prior act victims reported the abuse to their mother the day after the abuse. LeMay, 260 F.3d at 1022-23. Although the mother did not report the abuse to police, she did stop letting LeMay babysit her children and restricted his access to them. Id. The LeMay Court reasoned that there were no relevant intervening circumstances under those facts. Id. at 1209.

When analyzing this factor in Campbell v. State, this Court recently noted that "[t]he record also demonstrates that Campbell's familial circumstances may have intervened to prevent him from having access to young children for some time, explaining away some of the remoteness of the events." Campbell v. State, 485 P.3d 213 (Nev. 2021) (unpublished).

Similarly, here, circumstances intervened which prevented Respondent from committing further crimes because he was arrested for attacking C.P. 1 AA 219. Thus, this likely explains why there were only two (2) victims. The district court should have found that this factor also cuts in favor of the State.

5. Evidence of the Prior Sexual Acts is Helpful or Practically Necessary to the State's Case.

In LeMay, the defense centered around the lack of corroboration of the victims' testimony, the absence of medical evidence to support the allegations, and a proposed motivation for the children to fabricate. LeMay, 260 F.3d at 1023. In affirming the trial court's decision, the Ninth Circuit determined that relevant propensity evidence was appropriately admitted to counter attacks to the credibility or memory of young witnesses, particularly where significant time had passed between the incidents themselves and the defendant's trial, and there was little corroborative evidence outside the victims' testimony. Id. at 1028-29.

In LeMay, the prosecutor apparently asserted that she would be able to secure a conviction even without the prior acts evidence. This fact, however, is not determinative of the final prong in LeMay's balancing test. "Prior acts evidence need not be *absolutely necessary* to the prosecution's case in order to be introduced; it must simply be helpful or *practically necessary.*" LeMay, at 1029 (emphasis in original). Indeed, even under NRS 48.045(3), the Court is still required to provide a limiting instruction cautioning the jury that they may not convict a defendant solely based on evidence that he committed a prior sexual act, and if the State truly did not believe it could prove the case without the prior sexual acts, it would have an ethical obligation to dismiss the charges. Thus, under Franks, the Nevada Supreme Court

determined that prior at evidence could be helpful to the State's case merely because it established the defendant's propensity to commit the offense. Franks, 135 Nev. at 6, 432 P.3d at 757.

In a case such as this where C.L. 's vaginal swab was positive for semen but there were no injuries consistent with sexual assault, evidence of Respondent's other crime is absolutely necessary, or at the very least helpful or practically necessary to demonstrate the sexual assault or attempted sexual assault in this case. 1 AA 20.

In addition, although Crime Scene Analysts were able to determine that the semen found on C.L. 's underwear was Respondent's, analysts were unable to get a useable DNA profile from C.L. 's vaginal swab. 1 AA 69, 76. Thus, the evidence of Respondent's other crime is necessary to show that it was Respondent and not someone else who sexually assaulted C.L., or that Respondent did not merely happen upon her body in the desert as the defense is likely to argue.

Accordingly, all five (5) Lemay factors clearly weighed in favor of admitting evidence of Respondent's other crime. The State submits that this is exactly the sort of case that the legislature had in mind when it amended NRS 48.045(3) to allow the admission of propensity evidence in cases involving sexual offenses. The district court manifestly abused its discretion in excluding evidence of Respondent's other crime and this decision was clearly arbitrary and capricious and in contradiction to

the spirit and purpose of NRS 48.045(3). United States v. LeMay,260 F.3d 1018, 1027-28 (9th Cir. 2001).

CONCLUSION

Wherefore, the State respectfully requests that this Court grant the State's Petition for Writ of Mandamus, or in the alternative, Petition for Writ of Prohibition, directing the district court to vacate its order and permit the State to admit evidence of Respondent's other crime in accordance with NRS 48.045(3).

Dated this 25th day of January, 2022.

Respectfully submitted,

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BY */s/ Taleen Pandukht*
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AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information, and belief.

Dated this 25th day of January, 2022.

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(9) because this writ has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this writ complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the writ exempted by NRAP 32(c)(2), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,000 words.
3. **Finally, I hereby certify** that I have read this appellate writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21, which requires every assertion in the writ regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of January, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 25, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by electronic emailing a true and correct copy thereof to:

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BY */s/ J. Hall*
Employee, District Attorney's Office

TP/Megan Thompson/jh