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 DANIELLE JONES, DISTRICT JUDGE, Respondents, and JOHN EUGENE DOANE, Real Party in Interest.	)	NO. 84134

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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COME NOW Deputy Public Defender DAVID LOPEZ-NEGRETE, on behalf of the Respondent (Real Party In Interest) JOHN EUGENE DOANE, and hereby answers the State's Petition for Writ of Mandamus and/or Prohibition filed in the above-captioned proceeding.

This answer to the Petition for Writ of Mandamus and/or Prohibition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 5th day of April, 2022.

Respectfully submitted,
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CLARK COUNTY PUBLIC DEFENDER
By: */s/ David Lopez-Negrete*
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POINTS & AUTHORITIES

FACTS

Instant Case

Starting on Friday, November 24, 1978, fourteen-year-old Carol Lum visited with her friends in their homes. (Petitioner's Appendix Vol. II:257).[1] She saw her closest girlfriend early Friday afternoon, then later from another location appeared to prank call her saying something about "in the desert" in a disguised voice and laughing. Id.

That night, Lum was in the company of her boyfriend, Albert Biggs, and a couple other friends at Jim Brown's house. Id. Around 9 p.m. Lum was at Biggs' home with him and his mother. Id. After falling asleep watching TV, Biggs' mother woke up close to 3 a.m. and saw Lum outside the home where she said she was waiting for a ride. Id. Instead, Biggs' mother drove her to Jim Brown's house, where Lum said she lived. Although, she did not end up sleeping there. Id. Brown's mother heard a knock outside and saw Lum duck out of view. Id. After Brown's mother woke him, he opened the door but Lum was gone. Id.

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[1] Hereinafter, citations to Petitioner's Appendix will start with volume number, followed by page number. For example, (Petitioner's Appendix Vol. I:52) will be shortened to (I:52).

Brown's last contact with Lum came by way of a phone call the next morning. (II:257). She wanted to buy him a car stereo by selling acid she had obtained. Id. Lum had a history of drug use according to her father. He had not seen her in over two months. Id. Police would later learn that Lum was involved in narcotics, including marijuana, cocaine, acid, and amphetamines, and used them frequently. Id.

Spurred by Lum's failure to come home on Friday evening, Lum's mother sought help from family friend John Bivens to locate Lum. Id. They worried that Lum had run away again, as she had in the past and that her friends were helping to hide her. Id. Bivens and his wife searched for Lum by calling her friends throughout Saturday night and into early Sunday morning, without success. Id.

Late Sunday morning, November 26, 1978, two young men riding their motorbikes in a desert area came upon Lum's body. Id. Police responded to their call, documented the crime scene, and performed an autopsy. Id. Lum was laying face-down on the ground. Id. She was clothed but her underwear and shoes were behind some nearby shrubbery. (II:258). She had a swollen eye but no visible injuries to her body. Id. The coroner examined Lum's genitals but found no trauma there; he also swabbed her vagina but noted it appeared dry, signaling that Lum did not

have sexual relations. Id. Lum did have hemorrhages in her throat muscles and organs, leading the coroner to find she died of manual strangulation. (II:257).

Lum's killing remained a cold case until police tested her underwear for DNA evidence in 2016. Id. Detecting sperm fractions on this piece of evidence led police to ultimately obtain a match to John Doane. Id. He now faces a charge of Open Murder. Id.

Other Crime

On the morning of February 20, 1979, fourteen-year-old Cheryl Parker was walking to Basic High School when John Doane offered to drive her the rest of the way. Id. She accepted and directed him to drop her off at the school corner but he continued on. Id. Doane then threatened Parker with a screwdriver, telling her not to make any trouble. Id. He had her sit closer to him, put her books in the backseat, and drove on the highway towards Boulder City. Id.

Seeing where things were headed, Parker told Doane she might as well undress and did so before they stopped at the lake. Id. Doane then subjected Parker to sexual intercourse. Id. Next, he drove them to another spot and sexually assaulted her two more times. Id. Doane took Parker to a third location nearby. Id. There, he used the screwdriver to threaten her

again, prompting her to plead for her life. (II:257). They then got out of the car and Doane made her perform fellatio, ultimately climaxing in her mouth. Id.

Afterwards, Doane choked Parker while she stood next to the car. Id. She fell to the ground, at which point he forced dirt and rocks into her mouth. Id. She screamed. Id. Doane then strangled Parker until she lost consciousness. Id. He also struck her in the face with a large rock. Id.

Parker awoke and wandered until park rangers located her around 9:30 a.m. Id. They rushed her to medical care. Id. Her cheekbone and area around her eye were fractured and crushed. Id. She suffered broken teeth as well. Id. She exhibited several stab wounds and cuts on her face and head, requiring stitches. Id. Multiple bruises and markings pervaded her neck and upper chest area, indicating strangulation. (II:259). A sexual assault examination revealed a significant amount of dirt inside the lips of her vagina, corroborating a struggle and rape that occurred on the ground. Id.

In all, Parker spent over sixteen days in the hospital and received reconstructive surgery. Id. At preliminary hearing, her jaw was nearly wired shut. Id. The focusing mechanism of her eyes suffered permanent injury and her face resulted permanently disfigured. Id.

Doane resolved the case against him. Id. He expressed remorse and pleaded guilty to eight serious charges for this attack: Mayhem; Attempt Murder; multiple counts of 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. (II:259).

At twenty-three years old, he received a sentence of life without the possibility of parole. Id.

I. THE DISTRICT COURT PROPERLY EXERCISED ITS WIDE DISCRETION TO EXCLUDE DISSIMILAR AND UNDULY PREJUDICIAL BAD ACT EVIDENCE.

The admission or exclusion of evidence rests within the district court's sound discretion. Thomas v. State, 122 Nev. 1361, 1370 (2006). Generally, a district court enjoys broad discretion on evidentiary rulings. See Fields v. State, 125 Nev. 776, 782 (2009). An abuse of discretion means no reasonable judge could have reached a similar conclusion under the same circumstances. Leavitt v. Siems, 130 Nev. 503, 509 (2014).

In our system of criminal justice, using prior bad acts to convict a defendant is "heavily disfavored" because they are often irrelevant and prejudicial. Tavares v. State, 117 Nev. 725, 730 (2001); accord Walker v. State, 116 Nev. 442, 445 (2000). The underlying concern is that showcasing

these acts will unduly influence the jury and lead it to convict the accused solely because it thinks he is a "bad person." Tavares, 117 Nev. at 730.

The appropriate inquiry for a mandamus petition is not whether other jurists would have ruled differently in this case. See Collier v. Legakes, 98 Nev. 307, 310 (1982) (noting mandamus will not disrupt the proper exercise of discretion or "substitute the judgment of this court for that of the lower tribunal."). Instead, this Court decides whether the trial judge arbitrarily, capriciously, or manifestly abused her discretion. State v. Dist. Ct. (Armstrong), 127 Nev. 927, 931–32 (2011); see also NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603–04 (1981). That requires considering whether the district court's decision was based on prejudice or preference rather than reason, is contrary to the evidence, or is contrary to or based on a clearly erroneous interpretation or application of the law. Armstrong, 127 Nev. at 931–32.

A. Arbitrariness

The district court made a well-reasoned ruling. An arbitrary exercise of discretion is one "founded on prejudice or preference rather than on reason." Id. (quoting Black's Law Dictionary 119 (9th ed. 2009) (defining "arbitrary")); see also City Council v. Irvine, 102 Nev. 277, 279 (1986)

(concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so").

Here, the lower court based its decision to exclude the Parker case on the legal framework established in NRS 48.045 and the cases interpreting it, including Franks v. State, 135 Nev. 1 (2019). Far from exhibiting bias, the district court actually took the matter under advisement, opting for time and a written decision. (I:247). The court considered the legal authority and arguments each party advanced and decided the issue on that basis. In its Minute Order as well as Findings of Fact, Conclusions of Law and Order, the court cited to and applied the relevant law to the facts at issue. (II:254-263). As a further sign of the judge's effort to make a reasoned decision, she heard the State's Motion to Reconsider. (II:278-81). She listened to debate on the factual scenarios of each incident along with their competing legal concerns. (II:278-81). She then again rooted her ruling and subsequent Order on statute and precedent. (II:281-84).

Importantly, the district court rested its decision on the bedrock consideration of probative value compared to undue prejudice. (II:283-84). All precedent relevant to the issue of bad act evidence instructs courts to engage in this analysis. See e.g., Petrocelli v. State, 101 Nev. 46 (1985); Walker v. State, 112 Nev. 819 (1996); Tinch v. State, 113 Nev. 1170 (1997);

Walker v. State, 116 Nev. 442 (2000); Tavares v. State, 117 Nev. 725 (2001); Richmond v. State, 118 Nev. 924 (2002); Rosky v. State, 121 Nev. 184 (2005); Ledbetter v. State, 122 Nev. 252 (2006); Bigpond v. State, 128 Nev. 108 (2012); Franks v. State, 135 Nev. 1 (2019); Randolph v. State, 136 Nev. 659 (2020). A trial judge must perform a gatekeeping function by weighing the need for proffered evidence on a case-by-case basis and excluding it when unfair harm substantially outweighs its possible benefit. Harris v. State, 134 Nev. 877, 880 (2018).

Unfair prejudice arises by appealing to a jury's emotion, sympathy, or another improper basis instead of its intellectual ability to assess evidence. Armstrong, 127 Nev. at 933-34 (internal citations omitted); accord Old Chief v. United States, 519 U.S. 172, 180 (1997). Before admitting bad act evidence, the trial judge must balance its probative value against the extent to which it will likely "rouse the jury to overmastering hostility." Randolph, 136 Nev. at 665 (internal citations omitted).

While acknowledging the State's theory for admitting the Parker matter, the district court concluded that the ensuing prejudice substantially outweighed its probative value. (II:283-84). The court evaluated the evidence of sexual assault in each case and found it lacking by comparison in the Lum matter. (II:281). The court was concerned with bootstrapping

the bad act to supply evidence of sexual assault in the instant prosecution. Id. And it found the Parker case "highly more prejudicial" than probative. (II:281). This constituted a quintessentially proper exercise of discretion, based on law and reason.

B. Capriciousness

Eschewing caprice, the trial court's ruling conformed to the lack of evidence that Doane sexually assaulted Lum. A capricious exercise of discretion is "contrary to the evidence or established rules of law." Armstrong, 127 Nev. at 931–32. (quoting Black's Law Dictionary 239 (9th ed. 2009) (defining "capricious")); see also City Council v. Irvine, 102 Nev. 277, 279 (1986) (concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so"). Abuse of discretion occurs when the trial court rests its decision on a clearly erroneous factual determination or it disregards controlling law. MB Am., Inc. v. Alaska Pac. Leasing, 132 Nev. 78, 88 (2016); accord NOLM, LLC v. Cty. of Clark, 120 Nev. 736, 739 (2004) (holding that relying on factual findings that are "clearly erroneous or not supported by substantial evidence" can be an abuse of discretion (internal quotations omitted)).

Here, passersby found Lum's body clothed in a ski-type jacket, blouse, corduroy pants, and socks. (I:239). Her underwear and shoes were

several yards away from her body. (I:239). It was on these items that police identified Doane's DNA, including sperm in the underwear crotch area. (II:258). But, the coroner examined Lum's genitals at the time and found no trauma there; he also swabbed her vagina but noted it appeared dry, signaling that Lum had not had sexual relations. (I:246). By basing its decision on the results of the police investigation, the district court did not make any clearly erroneous factual findings.

To buttress its argument that a sexual assault occurred in the instant case, the State points to unidentified sperm subsequently found in Lum's vaginal swab. (Petition at 7-8; I:76). It bears noting that this information does not form part of the record presented to the court below. Though the State argues this fact on appeal, it is absent from the facts section in the State's initial motion and Defendant's opposition. (I:119, 224-26). The exhibits accompanying the pleadings do not adduce this evidence either. (I:128-221, 236-46). The district court's Findings of Fact, therefore, included the facts that were actually in the record. (II:256-59). The vaginal swab did not arise later via the State's motion for rehearing—in writing or during oral argument. (II:266-67, 278-82). Consequently, the court's Order denying rehearing also rested on the same record. (II:283).

While asserting that the district court misapprehended the facts, the State submitted an Appendix on appeal that has around one hundred pages of previously un-argued grand jury transcripts. (I:1-112). Yet, failing to specifically object on the grounds raised in an appeal precludes appellate review on the grounds not cited below. Pantano v. State, 122 Nev. 782, 795 n. 28 (2006); Guy v. State, 108 Nev. 770, 780 (1992), cert. denied, 507 U.S. 1009 (1993) (noting Supreme Court would not consider unpreserved arguments raised on appeal). The State, thus, impermissibly argues facts outside the confines of the actual appellate record.

Should one argue that remand is necessary because the district court's decision rested on an incomplete factual record, this recourse would clearly violate the principles of invited error or forfeiture. Error is "invited," and therefore waived, when an appellant "induced or caused the error" and "intentionally relinquished or abandoned a known right." U.S. v. Perez, 116 F.3d 840, 845 (9th Cir. 1997) (en banc); see also U.S. v. Silvestri, 409 F.3d 1311, 1327 (11th Cir. 2005) ("Where invited error exists, it precludes a court from invoking the plain error rule and reversing."); Thomas v. Hardwick, 126 Nev. 142, 157, 231 P.3d 1111, 1121 (2010) (citing U.S. v. Yu–Leung, 51 F.3d 1116, 1121–22 (2d Cir.1995) (discussing U.S. v. Olano, 507 U.S. 725 (1993) ("a decision not to raise an objection for strategic reasons

amounts to waiver, not merely forfeiture, and is not reviewable even for plain error.").

"Forfeiture is the failure to make the timely assertion of a right." U.S. v. Mariano, 729 F.3d 874, 881 (8th Cir. 2013). Forfeiture "serves to induce the timely raising of claims and objections thereby providing courts the opportunity to consider and resolve them." State v. Puckett, 556 U.S. 129, 134 (2009). Therefore, forfeited errors can be reviewed on appeal under plain error. See Mantinorellan v. State, 343 P.3d 590, 593 (Nev. 2015).

Under either scenario, the State maintains now that the district court's decision had no basis in fact by repeatedly pointing to facts from the grand jury presentment which it did not present below. (Petition at 7-8, 16-17, 20, 23-25, 30). Given that this evidence was not in the initial moving papers or request for rehearing, waiver applies. Forfeiture also denies remand because the district court could not commit error—let alone a plain one—regarding any facts that were not even before it. A mandamus petition also involves the arguably higher standard of review of arbitrary, capricious, or manifest abuse of discretion.

Regardless, the fact that Lum's vaginal swab contained unidentified sperm does not salvage the weak claim that Doane sexually assaulted her. If anything, it unlocks the theory that Lum had relations with another man—

and he raped and murdered her. Whereas police found only Doane's DNA on Lum's underwear, police cannot rule out that the unidentified sperm inside her vagina belongs to a completely different individual.

In sum, the trial judge based her decision to exclude Doane's other crimes on a fair view of the evidence in the instant case. Instead of making a clearly erroneous interpretation, this view conformed to the facts and aligned with investigators' own examination of the evidence regarding sexual assault. (I:239, 246; II:258). Compared to the definitive evidence of rape in the Parker case, the Lum case is especially lacking. (II:281). By following the facts, the trial court properly exercised its discretion and determined that the probative value of the other crime could not overcome the ensuing prejudice.

C. Manifest Abuse

The district court below did not manifestly abuse her discretion either because it properly applied the law to the facts. A district court manifestly abuses its discretion through a clearly erroneous interpretation or application of the law. Armstrong, 127 Nev. at 931–32 (citing approvingly Steward v. McDonald, 330 Ark. 837 (1997); Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628 (2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due

consideration"); Blair v. Zoning Hearing Bd. of Tp. of Pike, 676 A.2d 760, 761 (Pa.Commw.Ct.1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.")); see e.g., Leavell v. Eighth Jud. Dist. Ct. In & For Cty. of Clark, 471 P.3d 749 (Docket No. 79923, filed September 14, 2020) (unpublished) (finding manifest abuse of discretion where trial court misapplied statute and published decisions barring second-degree murder charge for DUI death).

Relying on NRS 48.045 and Franks, the district court found the incidents dissimilar on the issue of sexual assault and, therefore, concluded that undue prejudice from the Parker matter substantially outweighed its probative value. (II:254-263, 278-84). Franks, 135 Nev. at 6, expressly requires this weighing and guides courts to first evaluate the similarity of each case under the balancing test of United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001).

The State contends that this misapplied the law. Again for the first time on appeal, the State argues that the district court imposed an added burden of proof the prosecution must meet on the index offense before trial. (Petition at 15). As noted, failure to specifically object on the grounds not

cited below precludes appellate review. Pantano v. State, 122 Nev. at 795 n. 28; Guy v. State, 108 Nev. at 780, cert. denied, 507 U.S. 1009 (1993). When the court denied the State's initial motion, the State had the opportunity to raise this burden of proof argument; but it is altogether absent from the motion for reconsideration. (II:265, 279-81).

As it happens, the State's position below was that NRS 48.045(3) and Franks do not require an evidentiary hearing, in contrast to NRS 48.045(2) and Petrocelli v. State, 101 Nev. 46 (1985). (I:125). The district court agreed and ruled based on the pleadings which detailed the State's proffer. (II:254-64, 281). Hence, it does not follow to now argue that the court imposed an added burden of proof while the State previously deemed any hearing unnecessary. Accordingly, the State waived or forfeited this argument. See U.S. v. Perez, 116 F.3d 840 (9th Cir. 1997) (en banc); see State v. Puckett, 556 U.S. 129 (2009).

At any rate, the district court did not impose any added burden on the State. Under Franks, the court compared and contrasted the facts of the other crime to the instant case, finding them dissimilar on the issue of sexual assault. While the Parker case has overwhelming, uncontroverted evidence of rape, the Lum matter does not. Sexual assault is not present in the Lum case "like there was that occurred in the [Parker] case." (II:281). This

reasonably led the court to find the Parker case had diminished probative value, especially in light of its prejudicial effect. The trial court dutifully followed the framework outlined in NRS 48.045 and applicable precedent to determine whether sufficient similarities established the other crime's relevance and outweighed its danger of unfair prejudice.

Performing this necessary gatekeeping function did not deprive the State of the ability to argue its case to the jury at trial. The State still has the right to present the entirety of its investigation regarding Lum's killing and its theory that Doane sexually assaulted her. The district court did not exclude any of the evidence that suggests Lum suffered sexual assault, like her underwear. It did not bar any of these witnesses from testifying at trial. It did not strike the felony murder theory that Doane murdered Lum in the course of a sexual assault. The district court's ruling does not invade the province of the jury as factfinder to decide if the facts in the Lum investigation establish that Doane sexually assaulted her. The district court simply did not insert itself in this question. Rather, it discharged its duty to weigh bad act evidence and exclude it when, in its discretion, it fails the prejudice/probative test of NRS 48.045 and Franks.

Under Franks and the LeMay factors, the danger of unfair prejudice substantially outweighed the probative value of introducing the Parker case.

1. The similarity of the other acts to the acts charged

The two cases share only broad parallels, like the victims' ages, strangulation, as well as discovery in the similar vicinity of desert. (II:257-59). The Lum case has a fragmented missing person narrative while the Parker case relates survival of a brutally violent attack, robust in its details.

The girls' backgrounds and circumstances of their victimization differ from the outset. While Lum was a repeat runaway, bouncing from house to house, out at late hours of the night and involved in drugs when she cut contact, Parker was simply walking to school, with her books in tow, the morning of her kidnapping. (II:257-59).

The injuries each suffered tell very different stories as well. Parker suffered threats with a deadly weapon followed by a series of sexual assaults in different positions, with dirt in her vagina, signaling a struggle and corroboration. Id. She also suffered fellatio and ejaculation in her mouth. Id. In contrast, it appears Lum may have suffered sexual assault based on the presence of semen on her underwear, which was off her body. Id. The medical evidence determined Lum's vagina was dry, lacked injuries, and there was neither an indication of fellatio. Id. Lum's injuries, though fatal, were much less extensive than Parker's. Id. She had a swollen eye but no significant injuries to her body. (II:258). None of the injuries on Lum's

head were noticeable prior to examining her skull and these were not serious. (II:246). In contrast, Doane pounded Parker's face with a large rock, broke her teeth, stuffed dirt and rocks in her mouth, cut her face and head, and strangled her more than once. (II:258-59).

This level of violence sets the Parker case far apart from the Lum matter. Indeed, it is a distinguishing feature absent from Lum's victimization. This underscores what the Lum case lacks and how it does not exemplify Doane's "modus operandi." And the charges in the Parker case speak volumes. The first count is **Mayhem**; all but one of the remaining counts include **Substantial Bodily Harm** and/or use of a **Deadly Weapon**. (II:259). Though Lum's case involves murder, it does not approximate anything close to mayhem perpetrated with deadly weapons that inflicted especially violent, mutilating injuries.

Had Lum missed school and her face been crushed with a boulder, or mouth packed with rocks and teeth broken, and dirt found in her vagina, or semen in her mouth, then one could argue her case carries Doane's signature. These are the distinctive aspects of Parker's case. Lum's murder has only superficial similarities which do not go beyond characteristics commonplace in sexual assault/murder investigations. Doane kidnapped,

verifiably raped, and maimed Parker while Lum did not exhibit evidence of sexual relations and died of strangulation.

The differences between the cases also make it difficult to establish that Doane's intent in both encounters would have been the same. It bears repeating that the medical evidence did not show Lum had sexual relations. (II:258). Her autopsy included examining her vagina, which suffered no trauma. Id. A vaginal swab revealed it was apparently dry. Id. With her underwear not on her body, though, this only weakly suggests rape in connection with her killing. In contrast, Parker detailed the violent rapes she suffered. (II:258-59). She was also wearing her underwear when rangers rescued her. Id. And Parker had physical evidence substantiating sexual assault. Id.

While Doane's intent to sexually assault Parker is clear, the same is not true regarding Lum. As a total stranger, he kidnapped Parker in order to rape her multiple times, strangled her to incapacitate her, and then tried to inflict a mortal blow with a large rock. If Lum had suffered a similarly violent attack then the intent to sexually assault her would be apparent. The Parker matter shows these go hand-in-hand for Doane's intent. With a scene only insinuating sexual assault, there are too many unanswered questions to posit that any sexual contact between Lum and Doane would have been

forced. There is no evidence regarding how they first met, or the nature of their relationship, the last time they were seen together, or if another person was involved in her murder.

Overall, these differences outweigh the similarities between the two. They also serve as an anchor that the remaining factors cannot overcome. blunt bulwark the potency of the remaining factors

2. The closeness in time of the prior acts to the acts charged

Though the State stresses that each incident occurred months apart, this gap weighs in Doane's favor. As expected, Franks and LeMay do not establish that a specific remoteness automatically renders a bad act inadmissible. The converse must also be true—a specific proximity does not instantly render one admissible. There is not a fixed deadline determining admission or exclusion. Just like decades may not exclude a prior, months may not admit it.

This factor helps courts discern whether a defendant's behavior in each incident—despite the passage of time—is evidence of propensity. See Franks, 135 Nev. at 4 (holding NRS 48.045(3) permits admission of propensity evidence); see LeMay, 260 F.3d at 1022 (finding Federal Rule of Evidence 403 protects defendants from unfair propensity evidence). Propensity means a natural tendency to behave in a particular way. Black's

Law Dictionary (11th ed. 2019) (defining "propensity"). On the one hand, this factor offers protection to defendants from remote incidents of misconduct. On the other hand, that protection wanes if each incident shares strong similarities. Thus, this factor permits showcasing a defendant's criminal disposition as evidenced in distinct episodes even if separated by significant time. In other words, is there a through line of criminal propensity connecting the offenses? The underlying question returns to whether defendant's actions in each matter are similar or dissimilar.

In LeMay, the fact that the defendant's behavior was "very similar" justified admitting his prior dating back eight years. 260 F.3d at 1028. Both episodes at issue involved defendant forcing fellatio from his young relatives while he babysat them. Id. In Franks, the subject offenses were "identical" and involved the same victim. 135 Nev. at 6.

In Doane's case, the differences between the Parker and Lum matters are too stark to make months of proximity justify admission of the bad act. The foregoing differences discussed above undermine the argument that there is a criminal propensity linking each incident. These disparities provide the underlying protection that keeps the prejudice of his prior at bay.

Alternatively, the State neglected to note that the relevant timeframe can be between the prior and defendant's trial. When discussing the

remoteness of the prior, the court in LeMay noted that about eleven years passed between defendant's bad act and trial. 260 F.3d at 1029. And the court in Franks considered the age of the victim when she testified at trial. Franks, 135 Nev. at 6-7. Viewed this way, 43 years separate Doane's instant trial and the commission of the crimes against Parker. While the precedent does not establish a fixed rule on remoteness, this lapse of over four decades weighs firmly in Doane's favor.

3. The frequency of the prior acts

Each incident occurred only once. Therefore, this factor also weighs in Doane's favor.

4. The presence or lack of intervening circumstances

The circumstances of Lum's demise are largely unknown. The months-long time gap allows for a host of intervening circumstances between the two crimes. Thus, this weighs in Doane's favor.

5. The necessity of the evidence

The Parker matter stands in stark contrast to the victim's testimony in Franks about other similar incidents. Franks involved one minor victim who testified about identical uncharged incidents of sexual touching during defendant's trial for a single count of Lewdness with a Child under the Age of 14. Franks, 135 Nev. at 2. The bad act evidence was necessary because it

showed the defendant repeatedly committed the same crime against the same victim, leading up to the charged incident he faced at trial. Id. at 6. Doane's trial deals with an unsolved murder that—at best—has only a suggestion of sexual assault. And Doane's sought-after bad act relates to a horrific attack against a different victim who survived. Telling the jury about Parker's attack is not necessary to establish Lum's murder; instead, it inflames the jury and exacts severe prejudice against Doane.

Taken as a whole, the admission of this bad act evidence is substantially more prejudicial than probative and, thus, fails the LeMay test. The concern that a jury will convict because a bad act shows a defendant deserves punishment still underlies Franks. This Court was concerned that in passing NRS 48.045(3), "the Legislature failed to outline any procedural safeguards to mitigate against the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment." Id. at 6 (citing Old Chief v. United States, 519 U.S. 172, 181 (1997)). The gruesomeness of the Parker matter all but guarantees this result for Doane. One cannot reasonably expect jurors to feel anything but overpowering hostility towards Doane. They cannot give him a fair trial with admission of his other crime.

In light of its heinousness, the Parker case will very naturally prejudice a jury against Doane. Needless to say, his actions caused a judge to sentence him to life without parole. (II:259). Similarly, the jury will conclude Doane is a bad person and convict him because of it. Parker's victimization was so extreme that it will irrevocably tarnish Doane in their minds. As a result, the evidence surrounding Lum's murder will not form part of the jury's deliberation. Given this level of ensuing prejudice, the Parker matter should not enter into his trial.

In many cases, presenting evidence of other acts does not unfairly prejudice the jury against the defendant because strong direct evidence supports his conviction. Ledbetter v. State, 122 Nev. 252, 263 (2006); Richmond v. State, 118 Nev. 924, 934 (2002); Rosky v. State, 121 Nev. 184, 197 (2005). In this case, however, Lum's killing suffers from a lack of detail and clues. For this reason, it remained a cold case for around forty years. As it stands, Doane has some avenues to defend against this murder charge. But those paths close with admission of the Parker case. Introducing his prior would devastate his defense and deprive Doane of his right to a fair trial.

The district court made a well-considered and justifiable decision to exclude this bad act evidence. Reasonable minds can differ and perhaps

another judge would have reached another conclusion. But disagreement does not authorize reversal. The State fails to clear the high hurdle of demonstrating that the court clearly erred and, further, that its decision was more than an error in judgment. See Armstrong, 127 Nev. at 931–32. Manifest abuse belongs to the realm of overriding the law. Id. The trial court applied the law properly and made a judgment call which was amply within its broad discretion on bad act evidence.[2] There was no arbitrary, capricious or manifest abuse of discretion here.

CONCLUSION

The district court properly exercised its wide discretion to exclude dissimilar and unduly prejudicial bad act evidence. This Court should not intervene given that the trial court's decision was based on law and reason, conformed to the facts, and properly applied governing authority. Therefore, Doane respectfully requests denial of the State's Petition.

Respectfully submitted,
DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ David Lopez-Negrete*
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[2] This happens routinely and, given the lack of decisions, reversing a district court's ruling is exceedingly rare. There are, however, at least two unpublished (but not citable) decisions affirming trial courts' exclusion of bad act evidence.

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)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 21(d):

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3. Finally, I hereby certify that I have read this 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 writ complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief 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 5th day of April, 2022.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ David Lopez-Negrete*
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5th day of April, 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 mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY *_/s/ Carrie M. Connolly_*
Employee, Clark County Public
Defender's Office