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.	Electronically Filed May 19 2022 09:51 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 84134 D.C. NO: C-20-346036-1

REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, TALEEN R. PANDUKHT, on behalf of the above-named Petitioner and submits this Reply to Answer to Petition for Writ of Mandamus and/or Prohibition and in obedience to this Court's order filed May 2, 2022, in the above-captioned case. This Reply is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 19th day of May 2022.

Respectfully submitted,

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BY */s/ Taleen Pandukht*
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MEMORANDUM AND POINTS OF AUTHORITIES

I. THE DISTRICT COURT ACTED ARBITRARILY, CAPRICIOUSLY, AND MANIFESTLY ABUSED ITS DISCRETION WHEN IT DENIED THE STATE'S MOTION TO ADMIT EVIDENCE OF OTHER CRIMES

"Where a district court *is* entrusted with discretion on an issue, the petitioner's burden to demonstrate a clear legal right to a particular course of action by that court is substantial; we can issue traditional mandamus only where the lower court has *manifestly* abused that discretion or acted arbitrarily or capriciously." Walker v. Second Jud. Dist. Ct. in & for Cnty. of Washoe, 136 Nev. 678, 680–81, 476 P.3d 1194, 1196–97 (2020) (citing *Martinez Guzman,* 136 Nev. 103, 105, 460 P.3d 443, 446 (2020)). "That is, traditional mandamus relief does not lie where a discretionary lower court decision 'result[s] from a mere error in judgment'; instead, mandamus is available only where 'the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.' Id. (quoting State v. Eighth Judicial Dist. Court (Armstrong), 127 Nev. 927, 932, 267 P.3d 777, 780 (2011)); see also Segovia v. Eighth Judicial District Court in and for County of Clark, 133 Nev. 910, 912, 407 P.3d 783, 785 (2017)) (holding that a writ of mandamus is available "to control a manifest abuse or an arbitrary or capricious exercise of discretion").

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A. The Court Acted Arbitrarily When it Denied the State's Motion to Admit Evidence of Other Crimes

"An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' Black's Law Dictionary 119 (9th ed. 2009) (defining "arbitrary"), or 'contrary to the evidence or established rules of law,' id. at 239 (defining "capricious")." Armstrong, 127 Nev. at 931–32, 267 P.3d at 780 (citing City Council v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986)).

Real Party in Interest argues that the district court did not exhibit bias because it took the State's Motion to Admit Evidence of Other Crimes under advisement, then in a further effort to make a reasoned decision, heard the State's Motion to Reconsider State's Motion to Admit Evidence of Other Crimes ("Motion to Reconsider"). Answer to Petition for Writ of Mandamus and/or Prohibition ("Answer") at 8. Further, Real Party in Interest argues that the court's decision was based on "the bedrock consideration of probative value compared to undue prejudice." Answer at 8.

However, the record demonstrates that the district court had a preconceived belief that the State has a weak case for sexual assault and that it improperly applied this bias to its ruling in contradiction to established law. In fact, in its order denying the State's Motion to Admit Evidence of Other Crimes, the district court erroneously held that the State had not even filed charges that qualify as a sexual offense. 2 AA

262 ("[T]he evidence presented does not establish that a sexual assault occurred in the instant case and there are no charges of sexual assault in the instant case. NRS 48.045(3) specifically deals with propensity evidence in sexual offense cases and that is not the case here.").

At the evidentiary hearing on the State's Motion to Reconsider, the district court once again repeated its opinion that "the evidence does not support that the sexual assault actually occurred." 2 AA 281. And again, in its Order Denying State's Motion to Reconsider State's Motion to Admit Evidence of Other Crimes, the district court comments on the sufficiency of the State's evidence:

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

2 AA 284. Contrary to Real Party in Interest's argument that the court's decision rested on a consideration of probative value versus prejudice, the district court clearly exhibited bias and as a result misapplied NRS 48.045(3).

The district court's application of NRS 48.045(3) was both contrary to the evidence and established rules of law. First, there was no basis for the district court to invade the province of the fact finder and conclude that the evidence presented does not establish that a sexual assault occurred, and therefore the other case lacked probative value. 1 AA 281, 284. 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 v. State, 135 Nev. 1, 4, 432 P.3d 752, 755 (2019). The statute merely indicates that the current case must be a "prosecution for a sexual offense" within the meaning of NRS 179D.097, which was met here. Under NRS 179D.097(1)(a), the term "sexual offense" includes "[m]urder of the first degree committed in the perpetration or attempted perpetration of sexual assault." Real Party in Interest was indicted under this theory. 1 AA 115. Thus, this is a "prosecution for a sexual offense" for purposes of NRS 48.045(3). The district court therefore acted contrary to established law when it determined that "the evidence does not support that the sexual assault actually occurred," essentially requiring the State to prove the sexual assault prior to trial. There was no basis in fact or law for the court to outright determine that the evidence does not support that a sexual assault actually occurred. Rather than applying the factors set out in Franks, the district court apparently continued in its belief that no sexual assault occurred in the instant case (invading the province of the fact finder) and permitted this perception to infect its ruling.

Real Party in Interest also fails to address 179D.097(1)(r), which defines a sexual offense as "[a]ny other offense that has an element involving a sexual act or sexual conduct with another." 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).

In addition to disregarding established law by judging the sufficiency of the evidence prior to applying NRS 48.045(3), the district court's decision also inexplicably brushes over the evidence showing that C.L. was sexually assaulted. [1] C.L., a fourteen-year-old girl was found strangled to death in the desert with a black eye, her underwear removed, and Real Party in Interest's semen in her underwear. 1 AA 78, 239. That the district court found that these facts do not strongly suggest that C.L. was sexually assaulted was arbitrary, capricious, and a manifest abuse of discretion.

B. The District Court Acted Capriciously When it Denied the State's Motion to Admit Evidence of Other Crimes

A district court's decision is capricious when it is "contrary to the evidence or established rules of law." Armstrong, 127 Nev. at 931–32, 267 P.3d at 780 (quoting Black's Law Dictionary 239 (9th ed. 2009)); (citing Irvine, 102 Nev. at 279, 721 P.2d

[1] The State notes that throughout parts of Defendant's Opposition to Admitting Evidence of Other Crimes, he appears to agree with the theory that C.L. had been sexually assaulted. 1 AA 228 ("The two cases share only broad similarities, like the victims' ages, sexual assault and strangulation, as well as discovery in the similar vicinity of the desert."); 1 AA 228 ("[I]t appears [C.L.] suffered sexual assault based on the presence of semen on her underwear . . ."); 1 AA 229 ("With her underwear not on her body, though, this suggests rape in connection with her killing.").

at 372).

Real Party in Interest notes that the State did not present the information that there was unidentified sperm found in C.L.'s vaginal swab to the district court below, nor did the State specifically point to the grand jury transcripts. Answer at 11–12. Real Party in Interest therefore argues that the issue is waived and/or forfeited.

The State acknowledges that this fact was not specifically listed in the State's Motion to Admit Evidence of Other Crimes or Motion for Reconsideration but believes that it is crucial information which needs to be presented. Moreover, even without this information, it was an abuse of discretion for the district court to find that the evidence does not show that C.L. was sexually assaulted. C.L., a minor child, was found strangled to death in the desert with a black eye and her underwear removed. 1 AA 239. Her underwear had Real Party in Interest's semen in it. 1 AA73. In addition, the coroner's report indicated that she had numerous hemorrhages on the top of her head and noted that "[i]t appeared that she was struck with some type of object."[2] 1 AA 246. Given C.L.'s injuries and the circumstances under which she was found, the district court's finding that evidence of sexual assault was lacking and that C.P.'s case therefore had diminished probative value was contrary to the

[2] Although this fact was not specifically argued below, this information was provided to the district court in Defendant's Opposition to Admitting Evidence of Other Crimes. 1 AA 246.

evidence. Accordingly, relief is warranted because the district court's decision was both contrary to the evidence and established rules of law.

C. The District Court Manifestly Abused Its Discretion When it Denied the State's Motion to Admit Other Crimes

Real Party in Interest argues that "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." Answer at 15 (emphasis added). Real Party in Interest's argument only highlights the fact that the court did not base its decision on an analysis of whether the sexual assaults themselves were dissimilar, but improperly decided that a sexual assault did not occur at all in the present case. Real Party in Interest argues that the State did not raise this argument below and that it is therefore waived and/or forfeited. Answer at 15–16.

Failure to object below generally precludes appellate consideration of an issue; however, the Nevada Supreme Court may conduct plain-error review. LaChance v. State, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014). But plain-error review is not ordinarily available where the complaining party invited the error. See id. (providing that "plain error does not exist when the complaining party contributed to the error because a defendant 'will not be heard to complain on appeal of errors which he himself induced or provoked the court or the

opposite party to commit'" (quoting Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994))).

Here, the district court committed plain error when it misapplied NRS 48.045(3). 2 AA 281. Moreover, as the State did argue below, it was an abuse of discretion for the district court to deny the State's Motion in light of the facts of this case. All of the evidence indicates that a sexual assault did in fact occur and all of the factors set out in Franks and Lemay weighed in favor of admissibility. Franks v. State, 135 Nev. 1, 432 P.3d 752 (2019); United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001). As the State explained in its Petition for Writ of Mandamus, considering the factors set out in Franks and Lemay, the danger of unfair prejudice did not substantially outweigh the probative value of the other case and it should have been admitted.

1. The Similarity of the Other Acts to the Acts Charged

C.L.'s attack bears striking similarities to the attack of C.P. in Real Party in Interest's other case. Both girls were fourteen (14) years old (1 AA 146, 237), they were last seen in the same area prior to their attack (1 AA 148, 237), the attacks occurred less than three (3) months apart (1 AA 216, 237), and both were taken to a remote desert location where they were sexually assaulted and strangled (1 AA 130, 246). Although C.P. was beaten more severely, C.L. suffered a black eye and hemorrhages on the top of her head. 1 AA 246. In addition, both girls had been beat

in the head with an object, in the case of C.P., a rock that was laying nearby. 1 AA 246, 1 AA 155.

Real Party in Interest attempts to characterize the instant case as a "fragmented missing person" case involving a girl who was "a repeat runaway, bouncing from house to house, out at late hours of the night and involved in drugs." Answer at 18. He contrasts this with C.P. who was "simply walking to school." Id.

C.L. was a teenage girl going to different friends' houses on the weekend as teenagers often do. Her mother began searching for her the same day that she went missing and her body was found the next day. 1 AA 237, 243. Despite Real Party in Interest's attempts at mischaracterization, C.L. and C.P.'s cases were similar in the ways relevant for purposes of NRS 48.045(3).

Real Party in Interest argues that the similarities described here are "commonplace" in sexual assault/murder investigations. Answer at 19. That the crimes both occurred in the same area, time frame, and both involved fourteen (14) year old girls who were taken to the desert, sexually assaulted, beaten, and strangled to death (or what the attacker probably presumed was death) is hardly commonplace. Given these facts, this factor weighed in favor of admissibility.

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2. Closeness in Time

In addition to the victims last being seen within three (3) miles of each other prior to the attacks, the attacks happened a little less than three (3) months apart. (1 AA 148, 216, 237). Thus, this factor clearly weighs in favor of admission.

Real Party in Interest fails to explain why this court should consider the amount of time that passed "between the prior and defendant's trial" in this case. Answer 22. The short amount of time that passed between the attacks is more probative of Real Party in Interest's propensity to commit these types of acts. Thus, this factor weighed in favor of admissibility.

3. Frequency

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 Real Party in Interest'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 (2) crimes occurred less than three (3) months apart, the rate at which Real Party in Interest was sexually assaulting young girls weighed in favor of admitting evidence of his other crime.

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4. Intervening Circumstances

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 Real Party in Interest 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. The Necessity of the Evidence

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 Real Party in Interest'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 Real Party in Interest's, analysts were unable to get a useable DNA profile from C.L.'s vaginal swab. 1 AA 69, 76. Thus, the evidence of Real Party in Interest's other crime is necessary to show that it was Real

Party in Interest and not someone else who sexually assaulted C.L., or that Real Party in Interest did not merely happen upon her body in the desert as the defense is likely to argue.

Accordingly, all five (5) Lemay factors weighed in favor of admitting evidence of Real Party in Interest's other crime. Although admission of C.P.'s case is prejudicial, it is not unfairly prejudicial. Real Party in Interest argues that "[t]he gruesomeness of the Parker matter all but guarantees" that he will be convicted because jurors believe he is a bad person. Answer at 24. However, the prior conduct admitted in Lemay was arguably far more inflammatory, where he had sexually assaulted an eight (8) month old and a two (2) year old. LeMay, 260 F.3d at 1022. In addition, the court would be 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. Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (The jury is presumed to follow district court orders and instructions.).

Whereas the probative value to show Real Party in Interest's propensity to commit these sorts of crimes is extremely high, any unfair prejudice could be remedied by a limiting instruction. Considering the factors set out in Franks and Lemay, the danger of unfair prejudice did not substantially outweigh the probative value of Real Party in Interest's other case and it should have been admitted pursuant

to NRS 48.045(3). Accordingly, the district court's denial of the State's Motion to Admit Other Crimes was arbitrary, capricious, and a manifest abuse of discretion.

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 Real Party in Interest's other crime in accordance with NRS 48.045(3).

Dated this 19th day of May, 2022.

Respectfully submitted,

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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 19th day of May, 2022.

BY */s/ 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 3,037 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 19th day of May, 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 May 19, 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