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,	)	CASE NO. 84134

PETITION FOR EN BANC RECONSIDERATION

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COMES NOW Chief Deputy Public Defender DAVID LOPEZ-NEGRETE, on behalf of the Real Party In Interest, JOHN EUGENE DOANE, and pursuant to NRAP 40A, petitions this Court for reconsideration on the panel's decision in the above-referenced case.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 13th day of February, 2023.

Respectfully submitted,

DARIN F. IMLAY,
CLARK COUNTYPUBLIC DEFENDER
By: */s/ David Lopez-Negrete*
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POINTS &AUTHORITIES

JURISDICTION

On December 30, 2022, the supreme court southern panel granted the State's Petition for a Writ of Mandamus, overturning the district court's decision to exclude bad act evidence. State v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark (Doane), 138 Nev. Adv. Op. 90 (2022). Thereafter, Doane filed a Petition for Rehearing which the panel denied on January 30, 2023.

Nevada Rules of Appellate Procedure 40A(a) permits en banc reconsideration of a panel decision (1) when it is necessary to secure and maintain uniformity of the decisions of the Supreme Court or (2) when the proceeding involves a substantial precedential, constitutional, or public policy issue.

As argued below, Doane respectfully petitions for en banc reconsideration because the panel's decision misconstrued Franks v. State, 135 Nev. 1 (2019), and the district court's ruling in conformity therewith. Moreover, the panel deviated from the precedent defining the applicable standard of manifest abuse of discretion. Finally, as published precedent on bad act litigation and mandamus relief, thiscase raises a substantial precedential issue of statewide significance; it also implicates theconstitutional question of a fair trial for Doane and other litigants.

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.

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

[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).

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. Id.

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

ARGUMENT

I. THE PANEL'S DECISION CONTRADICTED THE FRANKS FRAMEWORK WHICH THE DISTRICT COURT FOLLOWED.

The panel issued a writ of mandamus because the relationship between the statute permitting admission of other sexual offenses for propensity purposes (NRS 48.045(3)) and the procedural safeguards instituted in Franks "requires clarification." Doane, 138 Nev. Adv. Op. at 6.It then ruled that the dispositive consideration for the applicability of NRS 48.045(3) is "simply whether the defendant has been charged with a sexual offense." Doane, 138 Nev. Adv. Op. at 9. This, however, diverges from the procedure that Franks expressly established.

First, away from the jury, the Statemust request permission to admit the prior sexual offense for propensity purposes. Franks, 135 Nev. at 5. The prosecution "must then proffer its explanation of how the prior sexual offense is relevant to the charged offense, i.e., tends to make it more

probable that the defendant engaged in the charged conduct." Id. (citing NRS 48.015). Thus, weighing the evidence—and not simply asking whether the defendant faces a sexual offense—immediately follows the State's request to admit a bad act. By citing to NRS 48.015, this Court anchored a district judge's inquiry on the probative value of the proposed evidence. The title of that statute is "Relevant Evidence" which it defines as "*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*." NRS 48.015 (emphases added).

In clear contradiction, the panel decided that a trial court may not "look beyond the charged crimes to consider the *evidence* the State may present to support the charges." Doane, 138 Nev. Adv. Op. at 9 (emphasis added). That essentially overrules Franks because it swallows the threshold relevance inquiry that Franks instituted. Relevance—i.e., probative value—is so important under Franks that it appears at the outset of its analytical framework and again as the first factor for considering undue prejudice under United States v. LeMay, 260 F.3d 1018(9th Cir. 2001), which this Court adopted. Id.at 6. Franks instructs courts to determine relevance by engaging the probative value of the facts—determining if sufficient evidence supports the State's effort—instead of simply checking a box that the State

has charged a sexual offense. The State can always argue that the bad act is relevant because the defendant faces a sexual offense. But Franks in no way makes that the dispositive consideration. Quite the opposite, Franks demands trial courts to determine relevance by considering the proposed evidence.[2]

In fact, a "significant concern" underlying this Court's analysis in Franks was the broad sweep of NRS 48.045(3) and how it threatened defendants' due process protections. Id. at 5. There is an inherent danger that jurors will convict a defendant due to uncharged crimes or, unsure of his guilt, simply because a bad person deserves punishment. Id. (citing Old Chief v. United States, 519 U.S. 172, 181 (1997). Because the legislature

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[2]The panel's rejection of weighing facts to determine threshold relevance validated the State's unpreserved argument that the district court had no basis "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)." (Petition at 15). When the trial court denied the State's initial motion, the State had the opportunity to raise this burden of proof argument; but it is absent from the motion for reconsideration. (II:265, 279-81). In its motion to reconsider, the State argued a different point: the district court misapprehended the law because it "specifically found that the current charge is not a sexual offense." (II:268). 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).

On appeal, the State also repeatedly and unapologetically cited facts from the grand jury presentment which it did not argue below. (Petition at 7-8, 16-17, 20, 23-25, 30; Reply at 8).

adopted NRS 48.045(3) without any limitations, this Court sought to "rectify the absence of procedural safeguards." Id. Accordingly, Franks grounded the statute in a detailed framework. Id. at 5-6.

As the first stake of this foundation, "the district court must make a preliminary finding that the prior sexual offense is relevant for propensity purposes[.]" Id. at 5.The very nature of a finding involves examining evidence. See Black's Law Dictionary (11th ed. 2019) (defining "finding of fact" as "A determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record[.]— Often shortened to finding."). Supporting this is the Court's citation to NRS 48.015 when discussing the bad act's relevance. Franks, 135 Nev. at 5. Adopting the opposite approach, the panel eschews "whether there is sufficient evidence to support the charge" and asks only if a defendant faces a sexual offense. Doane, 138 Nev. Adv. Op.at 9. In so doing, the panel uprooted the initial safeguard of probative value that Franks expressly requires.

Here, the trial court cited NRS 48.045(3) as well as Franks as the controlling authorities and based its ruling on the "evidence presented." (II:262). Rather than ruling that NRS 48.045(3) was inapplicable, as the panel stated, or that the current charge is not a sexual offense, as the prosecution argued, the district court found the bad act "inadmissible under

NRS 48.045(3)." Id. Mentioning that NRS 48.045(3) involves propensity in sexual offenses "and that is not the case here" represents *dictum* and not the heart of the lower court's decision. Id. Accordingly, when the State argued for reconsideration, the court never maintained that NRS 48.045(3) did not apply. (II:281; 283-84). The court acknowledged the State's charging decision and theory. Id. It then followed the dictates of Franks to "evaluate whether that evidence is unfairly prejudicial." 135 Nev. at 6. The district court's rulings found the 1979 bad act irrelevant as well as unduly prejudicial. To ascertain relevance, the court compared the facts of each case closely and found the bad act "highly more prejudicial" than probative. (II:281).

The panel also underminedthe related safeguard of similarity between the index offense and bad act. The panel employed a vague "sufficiently similar" standard that is not in Franks or LeMay, *supra*. Doane, at 11-12. In Franks, 135 Nev. at 6., the subject offenses were "identical" inappropriate touching and involved the same victim. In LeMay, 260 F.3d at 1028, the fact that defendant's behavior was "very similar" justified admitting his prior dating back eight years. Both episodes at issue involved defendant forcing fellatio from his young relatives while he babysat them. Id. By weighing if the incidents are just "sufficiently similar," the panel loosened

this safeguard significantly; additionally, the panel adopted a thoroughly elastic standard that provides onlyindeterminate protection.

The district court here relied on NRS 48.045 and Franks, to find 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). 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.

Employing more than a superficial analysis, the trial court closely examined the similarities and differences between the two incidents. (II:281). 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). The lower court was concerned with bootstrapping the bad act to supply evidence of sexual assault in the instant prosecution. Id.

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 Franks.

The panel would undermine the final underpinning of the Franks framework by offering no deference to the lower court's express finding of undue prejudice and, thus, exclusion the bad act. Franks, 135 Nev. at 3 (reviewing admission of evidence for abuse of discretion).

II. THE PANEL DEPARTED FROM THE APPLICABLE STANDARD OF REVIEW AND INVADED THE DISTRICT COURT'S PROVINCE.

By intervening in the lower court's valid evidentiary ruling, the panel overreached. It failed to demonstrate just how the district court's decision

meets the exceedingly demanding standard of manifest abuse of discretion. Instead, the panel conducted a *de novo* review, making its own evidentiary decision,effectively supplanting the district court and overruling settled law.

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).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). 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).

The appropriate inquiry for a mandamus petition is not whether other jurists would have ruled differently in a 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."). Rather, the higher court decides whether the trial judge arbitrarily, capriciously, or manifestly abused her discretion. 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).

A district court manifestly abusesits 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).

Here, beyond offering any due deference, the panel did not detail how the district court's decision was on par or worse than the precedent defining manifest abuse of discretion. The panel based its reversal on the need to clarify Franks. Doane, 138 Nev. Adv. Op. at 6. The panel cited State v. Fourth Judicial Dist. Court (Martinez), 137 Nev. 37, 38, 481 P.3d 848, 850 (2021), as support since that case also involved "an unsettled legal issue of

statewide significance."But how could the trial court manifestly abuse its discretion on an unsettled point of law? If the instant legal issue is unclear,this inures to the district court's favor.Ultimately, the panel's intervention replaced the lower court's considered judgment with its own.

On the dispositive question of whether the bad actcaused unfair prejudice, the panel did not show why the only acceptable answer was no. The panel reviewed the LeMay factors with fresh eyesand faulted the district court for not addressing each one separately.Doane, 138 Nev. Adv. Op. at 11. As support, the panel cited Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258 (9th Cir. 2000), even though Franks did not cite it and LeMay cited it to affirm that "district judges retain the discretion to exclude evidence that is far more prejudicial than probative." 260 F.3d at 1026. Moreover,the lack of a factor-by-factor Order does not vitiate the district court's evaluation of the LeMay factors. "[A]lthough the district judge did not discuss the specific factors we deemed relevant in Glanzer, the record reveals that he exercised his discretion to admit the evidence in a careful and judicious manner." LeMay, 260 F.3d at 1028. After full briefing and oral argument, 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 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. Id. She then again rooted her ruling and subsequent Order on statute and precedent. (II:281-84). There was, thus, an ample record to support the trial court's close examination of the matter.

If the district court's rulings were lacking, thepanel should have simply ordered more fulsome findings. See State v. Adams, 516 P.3d 673 (2022) (Docket No. 81782, filed September 12, 2022) (unpublished) (Herndon, J. concurring) (advocating "reverse and remand to the district court for it to conduct a proper analysis and enter adequate findings of fact and conclusions of law."); accord State v. Manson, 516 P.3d 674 (2022) (Docket No. 82038, filed September 12, 2022) (unpublished) (Herndon, J. concurring) (same).This course would at least conform with the applicable standard of review, respecting the district court's exercise of sound discretion. The fact that the panel re-analyzedeach LeMay factor and implemented its view of the case demonstrates it overstepped.

Ultimately, the panel dismissed the trial court's explicit ruling that the bad act was "highly more prejudicial" than probative. (II:281). While acknowledging the State's theory for admitting the prior, the district court concluded that the ensuing prejudice substantially outweighed its probative value. (II:283-84).

By comparing and contrastingthe facts, the trial court discharged its gatekeeping role to exclude evidence whose unfair harm substantially outweighs its possible benefit. Harris v. State, 134 Nev. 877, 880 (2018). Since the first pleadings, Doane has provided examples and legitimate reasons to argue at length why unfair prejudice results from admitting his prior conviction.[3](I:227-234; II:274-75; Answer at 18-27). In a word, it devastates Doane's constitutional right to a fair trial; that is the ultimate factor that cuts in his favor.The district court sided with Doane and found that he could not receive a fair trial with admission of the bad act. (II:281; 283-84). That is a valid and sufficient basis under the non-exhaustive LeMay factors to warrant exclusion. After all, unfair prejudice arises by

[3]It bears repeating that the instant offense occurred over forty years ago and was a cold case. Doane has repeatedly stressed that the circumstances of Lum's killing are largely unknown and that another person victimized her. (I:227-234; II:274-75; Answer at 18-27). Faulting Doane for not providing additional details (e.g., regarding intervening circumstances)constitutes impermissible burden-shifting. Sandstrom v. Montana, 442 U.S. 510 (1979).

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). To ensure a constitutionally sound trial, "district judges retain the authority to exclude potentially devastating evidence." LeMay, 260 F.3d at 1027. The district judge here did not manifestly abuse her discretion when she tried to protect this trial against such a predicament.

Manifest abuse belongs to the realm of overriding the law. See Armstrong, 127 Nev. at 931–32. It occurs when a court clearly errs and, further, makes a decision that is more than an error in judgment. Id. The trial court's judgment call was based on a fully argued record and a reasonable decision under the circumstances. The panel's differing view does not meet the demanding standard that authorizes extraordinary intervention.

III. THIS CASE IMPLICATES A SUBSTANTIAL PRECEDENTIAL, CONSTITUTIONAL QUESTION.

En banc reconsideration is appropriate given that,as the panel noted, this case involves "an issue of statewide significance[.]" Doane, 138 Nev.

Adv. Op. at 6. The panel issued the extraordinary remedy of mandamus relief because of this. Id. Its decision now governs all litigation on NRS 48.045(3) and Franks. In Doane's view, whereas Franks affixed procedural limitations, the panel released them.

Moreover, this published caseis anexample of what constitutes abuse of discretion (manifest or not). This precedent now impacts all litigation regarding those standards of review. In Doane's view, the panel overreached by effectively deciding that no reasonable judge would have ruled similarly.

Finally, the stakes are a constitutionally fair trial under the sixth and fourteenth amendments as well as Franks. Because Doane's prior is particularly gruesome and heinous, any reasonable juror will feel only overpowering hostility towards him. A judge has already sentenced him to life without parole for it. (II:259). A jury will similarly decide that Doane is a bad person and unfairly convict him on that basis.

Presenting evidence of other acts does not unfairly prejudice the jury against the defendant when 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. Accordingly,

it remained unsolved for four decades. 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 a trial that passes constitutional scrutiny.

CONCLUSION

Based on the foregoing, Doane respectfully requests en banc reconsideration.

Respectfully submitted,

DARIN F. IMLAY,
CLARK COUNTY PUBLIC DEFENDER

By: *__/s/ David Lopez-Negrete___*
DAVID LOPEZ-NEGRETE, #12027
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc reconsideration complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

It has been prepared proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 4, 280 words which does not exceed the 4,667 word limit.

DATED this 13th day of February, 2023.

Respectfully submitted,

DARIN F. IMLAY,
CLARK COUNTY PUBLIC DEFENDER

By: *__/s/ David Lopez-Negrete_____*
DAVID LOPEZ-NEGRETE, #12027
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of February, 2023 Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD DAVID LOPEZ-NEGRETE
ALEXANDER CHEN

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JOHN E. DOANE
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c/o High Desert State Prison
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Indian Springs, NV 89070

BY ____*/s/ Carrie M. Connolly*_____
Employee, Clark County Public
Defender's Office