**IN THE SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| LAZARO MARTINEZ-HERNANDEZ<br>Appellant,<br>v.<br>THE STATE OF NEVADA,<br>Respondent. | CASE NO: 69169 |



**FAST TRACK RESPONSE**

**Routing statement:** Pursuant to NRAP 17(b)(1), this case is presumptively assigned to the Court of Appeals because it is a post-conviction appeal in a matter involving a Category B felony. Supreme Court review may be beneficial, however, because Appellant raises a question of law that is of statewide importance and for which there is not existing precedent. *See* NRAP 17(a)(13) & (14).

**1. Name of party filing this fast track response:** The State of Nevada

**2. Name, law firm, address, and telephone number of attorney submitting this fast track response:**

Ryan J. MacDonald
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2750

**3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:**

Same as (2) above.

**4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:**

*Owens (Daniel) v. State*, No. 69331. *Owens* and the case at bar stem from different underlying offenses, but the district court considered both cases at the same time because they involve the same issues. Although briefing is still in progress in

*Owens*, this Court should consider consolidating the cases pursuant to NRAP 3(b)(2).

**5. Procedural history:**

On February 16, 2007, the State filed an Information which charged Lazaro Martinez-Hernandez ("Appellant") with one count of Assault with a Deadly Weapon (Category B Felony – NRS 200.471). AA 113.

A jury trial began on February 4, 2008, and the jury found Appellant guilty of Assault with a Deadly Weapon the next day. AA 1, 4, 113.

On April 10, 2008, the district court held a hearing during which it adjudicated Appellant guilty pursuant to the jury's verdict and sentenced him to 36 months' imprisonment with parole eligibility after 12 months. AA 2. The Court then suspended the sentence and placed Appellant on probation for an indeterminate period of time not to exceed three years. AA 2. A Judgment of Conviction was then entered on April 24, 2008, and Appellant did not file a direct appeal. AA 2-3, 114.

Appellant did not comply with the terms of probation. AA 4-5. So, on January 21, 2010, the district court revoked probation and imposed the original sentence with 96 days' credit for time-served. AA 4-5; 114. An Amended Judgment of Conviction followed on February 1, 2010. AA 4-5. Once again, Appellant did not file a direct appeal. Appellant was then incarcerated and released after 12 months, a fact that would become significant years later. AA 87.

On February 1, 2011, Appellant filed, with the assistance of counsel, a Post-Conviction Petition for Writ of Habeas Corpus in which he alleged ineffective assistance of counsel and appeal deprivation. AA 6-16. The district court ordered additional briefing on the matter, and on May 18, 2012, Appellant filed a "Supplemental Brief for Writ of Habeas Corpus" which was substantially similar to his original Petition. The State timely responded to the Petition and Supplemental Brief and filed a Motion to Dismiss on July 2, 2012. AA 54-59; 114.

The district court held a hearing regarding the Petition on November 27, 2012. Thereafter, on July 19, 2013, the court issued an Order Granting Petition for Writ of Habeas Corpus in which it held that Appellant was wrongfully deprived of an appeal, and as such, was entitled to file an untimely appeal pursuant to *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994), and NRAP 4(c).[1] AA 60. The court did not, however, address Appellant's ineffective-assistance claims. AA 60.

Appellant filed the Opening Brief to his direct appeal on December 18, 2013, and the State filed its Answering Brief less than a month later. *See Martinez-Hernandez (Lazaro) v. State*, Docket No. 63650 – C-Track Docket Entries. On July 22, 2014, this Court affirmed Appellant's conviction and sentence in an unpublished order. *Martinez-Hernandez (Lazaro) v. State*, Docket No. 63650 (Order of

[1] The order granted relief "pursuant to NRAP 4(e), but that provision is inapposite.

Affirmance). Remittitur issued on August 26, 2014. AA 114.

On February 24, 2015, Appellant filed a "[Second] Supplemental Brief for Writ of Habeas Corpus," in which he alleged once again ineffective assistance of trial counsel. AA 68-79. On July 22, 2015, the State responded with a Motion to Dismiss in which it argued that writ relief was unavailable because Appellant completed his sentence at least two years prior to the Second Supplemental Brief. AA 81-84.

The district court held a hearing regarding Appellant's Petition and Supplements thereto on September 4, 2015. AA 85. During the hearing, the district court told the parties to limit their argument to the procedural issue regarding Appellant's custody status, or lack thereof. AA 88. It explained that it was particularly interested in the issue of post-conviction writs filed by petitioners who in custody but who are released before a decision is made regarding the petition, as it encountered the issue on a regular basis and had done some independent research, particularly with regard to *State v. Baliotis*, 98 Nev. 176, 643 P.2d 1223 (1982). AA 89-90. Then at the conclusion of the hearing, the court ordered supplemental briefing. AA 90-91.

Appellant filed a supplemental brief labeled "Reply to State's Motion to Dismiss" on September 11, 2015, AA 93-98, and the State filed its supplemental brief on October 6, 2015. AA 100-03.

Thereafter, on October, 9, 2015, the court held another hearing regarding the justiciability of Appellant's Petition. AA 106. After entertaining argument, the court reasoned, "under 34 -- NRS 34.724 only a person who is under restraint may file a writ which happened here, so it's timely. However, under Nevada Constitution, I only have power to issue writs on behalf of persons in actual custody. The Defendant is not in custody." AA 109. Accordingly, the court concluded that writ relief was not available to Appellant, though he encouraged Appellant to appeal, and hopefully, gain some clarification from this Court. AA 110. Written Findings of Fact, Conclusions of Law, and an Order denying Appellant's Petition followed on November 5, 2015. AA 113-15.

Appellant then filed the instant appeal on December 23, 2015. The State responds as follows and respectfully requests that this Court AFFIRM the district court's order denying Appellant's Post-Conviction Petition for a Writ of Habeas Corpus.

**6. Statement of Facts:**

On June 12, 2006, Appellant threatened the owner of a nightclub and his employees after a colleague of Appellant's was injured inside the club. AA 10. After screaming and yelling for a short period of time, Appellant retrieved a loaded handgun from his vehicle and proceeded to point it at the employees, stating that he was going to kill them. AA 66-67. Fortunately, police officers reported to the scene

and were able to diffuse the situation before anyone was shot or killed. AA 10, 66-67.

**7. Issues on appeal:**

I. WHETHER THE DISTRICT COURT ERRED BY DENYING APPELLANT'S PETITION BECAUSE HE WAS NO LONGER INCARCERATED.

II. WHETHER THERE ARE EQUITABLE REASONS TO CONSIDER THE PETITION.

**8. Legal Argument, including authorities:**

## I.
## STANDARD OF REVIEW

"When deciding an issue of first impression, this [C]ourt exercises its review de novo." *Rubio v. State*, 124 Nev. 1032, 1041, 194 P.3d 1224, 1230 (2008). Moreover, "[u]nder Nevada law, the construction of a statute is a question of law that [this Court] review[s] de novo." *State v. Kopp*, 118 Nev. 199, 202, 43 P.3d 340, 342 (2002); *see also* *We the People Nev. v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008) (Constitutional interpretation uses the same rules and procedures as statutory interpretation).

## II.
## THE DISTRICT COURT PROPERLY DENIED APPELLANT'S PETITION BECAUSE HE WAS NO LONGER IN CUSTODY

### A. Appellant misconstrues the district court's ruling

Appellant claims that the district court denied his Petition because it determined it "had no jurisdiction." AOB 5. The record demonstrates, however,

that the district court's decision was predominately based on *justiciability*, not jurisdiction, as the district court held that "Defendant is not entitled to relief through a post-conviction Petition for Writ of Habeas Corpus since Defendant is no longer in custody or on probation or parole." AA 114. In other words, the district court determined that the Petition was moot because a Writ of Habeas Corpus would have no practical effect, and as this Court has explained, "the issue of mootness goes to the controversy's justiciability." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003). So, while this Court certainly may address the issue of jurisdiction sua sponte, *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990), the State submits that justiciability is equally relevant to this appeal.

Appellant's confusion regarding the difference between jurisdiction and justiciability is understandable given that even this Court has confused the two doctrines. *See City of Henderson v. Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006) ("Although *Rosequist v. International Ass'n of Firefighters*, 118 Nev. 444, 451, 49 P.3d 651, 655 (2002), describes the district court as lacking subject matter jurisdiction when an employee has failed to exhaust administrative remedies under the statute, justiciability, and not jurisdiction, is at play. The district court is not divested of subject matter jurisdiction; instead, the matter is simply not ripe for the district court's review."). Nevertheless, "[j]urisdiction, as applied to a particular

claim, case or controversy, is the power to hear and determine that controversy." *State v. Borowsky*, 11 Nev. 119, 123 (1876). Justiciability, by contrast, is a question of whether a matter is appropriate for adjudication by a court. *See UMC Physicians' Bargaining Unit of Nev. Serv. Emples. Union, SEIU Local 1107 v. Nev. Serv. Emples. Union/SEIU Local 1107*, 124 Nev. 84, 93, 178 P.3d 709, 715 (2008) ("[A] justiciable controversy" requires a ripe dispute between two interested and adverse parties, in which the moving party's interest is legally recognized." (Discussing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)).

**B. <u>District courts lack jurisdiction where a habeas petitioner is no longer in custody or otherwise serving a sentence</u>**

NRS 34.724(1) provides that a person "convicted of a crime and under sentence of death or imprisonment" may file a petition for a writ of habeas corpus to challenge the conviction, the sentence, or the computation of time served. Several of this Court's decisions similarly hold that a petitioner must be under a sentence of conviction when he or she files a petition for a writ of habeas corpus. *See, e.g.*, *Coleman v. State*, 130 Nev., Adv. Op. 22, 321 P.3d. 863, 865 (2014) ("Accordingly, a post-conviction petition for a writ of habeas corpus cannot be filed by a petitioner who is no longer under a sentence of death or imprisonment for the conviction at issue."); *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242, (1999) ("[A] petitioner must not have completed service of the sentence for the conviction he

seeks to challenge at the time he files his petition challenging that conviction."); *Baliotis*, 98 Nev. at 178, 643 P.2d at 1224 (holding that writ relief was not available because, "[a]t the time he petitioned for post-conviction relief, Baliotis was not subject to any active or constructive restraint or supervision."); *Dixon v.Warden*, 85 Nev. 703, 704-05, 462 P.2d 753, 754 (1969) ("[T]he provision 'under sentence' means that the petitioner must at the time he files his writ for habeas relief be subject to Nevada authority, whether as one physically confined or under supervision as a probationer or parolee or otherwise restrained of liberty.").

All of these authorities have one common theme: they address when a petitioner may *file* his or her Petition for a Writ of Habeas Corpus. Here, however, it is undisputed that Appellant was incarcerated when he initially filed his Petition for Writ of Habeas Corpus, so this case differs from *Baliotis* and other cases where the petitioner was *not* subject to any active or constructive restraint or supervision when he filed a Petition. As such, it appears that Appellant's Petition satisfied the applicable jurisdictional standards when it was filed. So, the more difficult question remains – if jurisdiction attached when Appellant filed his Petition, was jurisdiction defeated by his subsequent release from custody? This appears to be an issue of first impression in Nevada.

"Article 6, Section 6(1) of the Nevada Constitution grants original and appellate jurisdiction to the district courts in the judicial districts of the state."

*Landreth v. Malik*, 127 Nev., Adv. Op. 16, 251 P.3d 163, 164 (2011). Although this Court has previously held that Article 6, Section 6(1) is ambiguous with regard to family courts, *id.*, 251 P.3d at 166, the Nevada Constitution is unambiguous regarding writs of habeas corpus:

> The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of *any person who is held in actual custody* in their respective districts, or who has suffered a criminal conviction in their respective districts and *has not completed the sentence imposed pursuant to the judgment of conviction*.

Article 6, Section 6(1) (Emphasis added).

Indeed, as emphasized above, Nevada's Constitution plainly states that district courts may only issue writs of Habeas Corpus to petitioners who are in "actual custody" or who have not yet "completed the sentence imposed." This Court thus need not look beyond the plain meaning of Article 6, Section 6(1) because it is undisputed in this case that Appellant was neither in actual custody nor serving his sentence when the district court denied the Petition. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 646, 173 P.3d 734, 739 (2007) ("[W]hen a constitutional provision's language is clear on its face, we may not go beyond that language in determining the framers' intent."); *see also* 3 *Sutherland Statutory Construction* § 57:17 (7th ed.) ("Under the general rule that grants of power are strictly construed, such provisions are generally mandatory in the sense that the power granted can be exercised only in strict conformity with the stated statutory conditions.").

Moreover, case law supports a plain-meaning approach in this matter. For example, this Court previously held, based upon the plain language of Article 6, Section 6, that "a district court may not issue a writ of habeas corpus if the post-conviction petitioner filed the petition challenging the validity of a conviction after having completed the sentence for the challenged conviction." *Jackson*, 115 Nev. at 23, 973 P.2d at 242. Further, *Jackson* held that the "in custody" requirement is jurisdictional, and as such, cannot be satisfied by incarceration on a different charge. *Id*. Likewise, in *Trujillo*, where this Court recognized *coram nobis*, it also stated, "for a person who is not in custody, Nevada's post-conviction habeas corpus scheme does not apply." *Trujillo v. State*, 129 Nev., Adv. Op. 75, 310 P.3d 594, 600 (2013).

The federal courts have similarly held, with regard to 28 U.S.C. § 2254, that present incarceration is a prerequisite to jurisdiction. *See, e.g., Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926 (1989) (stating that the "in custody" requirement for has never been extended "to the situation where a habeas petitioner suffers no *present* restraint from a conviction") (emphasis added); *Van Zant v. Fla. Parole Comm'n*, 104 F.3d 325, 327 (11th Cir. 1997) ("A petitioner is not 'in custody' to challenge a conviction when the sentence imposed for that conviction has completely expired"); *Crank v. Duckworth*, 905 F.2d 1090, 1090 (7th Cir.1990) ("Because custody directly under these old convictions has ended, 28 U.S.C. § 2254 does not authorize a petition for a writ of habeas corpus seeking

release; you can't be released from a sentence that expired by its own terms."); *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) ("[E]ven grievous collateral consequences stemming directly from a conviction cannot, without more, transform the absence of custody into the presence of custody for the purpose of habeas review."; *Butti v. Fischer*, 385 F.Supp.2d 183, 184-85 (W.D.N.Y. 2005) ("This 'in custody' requirement is jurisdictional and is satisfied if the petition is filed while the petitioner is in custody pursuant to the conviction or sentence being attacked.").

And in other states with similar habeas corpus schemes, courts have routinely held that they lack jurisdiction to review a petition once the petitioner has completed his or her sentence. *See, e.g.*, *Escamilla v. Superintendent, Rappahannock Reg'l Jail*, 777 S.E.2d 864, 868 (Va. 2015) ("Detention is jurisdictional in habeas corpus, and therefore a prerequisite to any consideration of a habeas petition"); *Richardson v. Comm'r of Corr.*, 6 A.3d 52, 57 (Conn. 2010) ("[C]ollateral consequences flowing from an expired conviction do not render a petitioner in 'custody' under § 52-466; rather, such a claim of confinement or custody and any accompanying 'loss of liberty [stem] solely from [a petitioner's] current conviction.'" (Quoting *Lebron v. Comm'r of Corr.*, 876 A.2d 1178, 1193 (2005)); *State v. Schill*, 286 N.W.2d 836, 842 (Wis. 1980) ("[T]he writ of *habeas corpus* [is] limited solely to those persons confined under sentence of a state court.")

Thus, based on the plain meaning of Article 6, Section 6 of the Nevada Constitution, as well as relevant authorities discussing the mandatory "in custody" requirement, the State respectfully submits that district courts lack jurisdiction to consider petitions when the petitioner is no longer "in custody," even if he was "in custody," when he filed the petition. Accordingly, the district court correctly denied Appellant's Petition.[2]

**C. The Petition is moot**

Nevertheless, even if the district court did not err by declining to exercise jurisdiction over Appellant's Petition, whether it should have done so is an entirely separate issue.

Courts have a "duty not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." *Personhood Nev. v. Bristol*, 126 Nev., Adv. Op. 56, 245 P.3d 572, 574 (2010); *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) ("'Judicial Power' is the *authority* to hear and determine justiciable controversies."). As such, a controversy must be present through all stages of the proceeding, *see Arizonans for Official English v. Arizona*,

[2] To the extent the district court should have dismissed the Petition, rather than denying it, the error was harmless. *Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 823 n.2, 221 P.3d 1276, 1280 n.2 (2009) (this court will affirm a district court's order if the district court reached the correct result, even for the wrong reason).

520 U.S. 43, 67, 117 S. Ct. 1055, 1068 (1997), and "[w]hen a live controversy "become[s] moot by the occurrence of subsequent events," courts ordinarily will not make legal determinations. *Univ. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004); *see also Matter of Guardianship of L.S. & H.S.*, 120 Nev. 157, 161, 87 P.3d 521, 523-24 (2004); *Pacific Live Stock Co. v. Mason Valley Mines Co.*, 39 Nev. 105, 111, 153 P. 431, 433 (1915); *Wedekind v. Bell*, 26 Nev. 395, 413-15, 69 P. 612, 613-14 (1902).

That said, whether "a criminal case is moot so as to preclude review of or attack on a conviction or sentence is unsettled," and "the area of greatest disagreement is that in which the accused has satisfied his sentence, as by serving a prison term or paying a fine." J.P. Ludington, *When Criminal Case Becomes Moot so as to Preclude Review of or Attack on Conviction or Sentence*, 9 A.L.R.3d 462, 2a (updated 2015). In this area, three general rules have emerged:

> (1) The traditional rule that the satisfaction of the sentence renders the case moot so as to preclude review of or attack on the conviction or sentence.
>
> (2) The liberal view that an accused's interest in clearing his name permits review of or attack on the conviction or sentence even after the sentence has been satisfied.
>
> (3) The federal rule that the satisfaction of a sentence renders the case moot so as to preclude review of or attack on the conviction or sentence unless, as a result of the conviction or sentence, the accused suffers collateral legal disabilities apart from the sentence, in which event the accused is held to have a sufficient stake in the conviction or sentence

> to permit him to obtain review of, or maintain a challenge to, the conviction or sentence.

*Id.*

Historically, Nevada followed the traditional rule. Indeed, in 1922, this Court declined to consider an original proceeding in habeas corpus where the defendant was released from incarceration after the case was submitted because the question before the court became moot. *Ex parte Wanatabe,* 45 Nev. 303, 304, 202 P. 1117, 1117. Similarly, in *Arndt,* the Nevada Supreme Court reversed a district court's decision to grant a petition for writ of habeas corpus because, "by the time his petition was heard by the district court," the defendant was "under no additional restraint or custody." *Dir., Nev. Dep't of Prisons v. Arndt,* 98 Nev. 84, 85 640 P.2d 1318, 1319 (1982). This Court should similarly follow the traditional rule and hold that a petitioner's release from custody renders a petition moot because "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," *Preiser* v. *Rodriguez,* 411 U.S. 475, 484, 93 S. Ct. 1827, 1833 (1973), and when a defendant is no longer "in custody," the essential purpose of habeas corpus ceases to exist. *See Hensley v. Mun. Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 351, 93 S. Ct. 1571, 1574 (1973) ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of

finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.").

In this matter, there was no longer a sense of urgency justifying extraordinary habeas relief because Appellant was not subject to a "severe restraint" on his individual liberty. As such, Appellant's Petition for a Post-Conviction Writ of Habeas Corpus was moot because a decision by the district court would not have any practical effect. *See Johnson v. Director, Dep't Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989) (when a defendant expires his sentence, any question as to the method of computing the sentence is rendered moot). *See also, e.g., Wright v. Bennett*, 131 N.W.2d 455, 456 (Iowa 1964) ("A writ of habeas corpus will not be granted to determine a mere abstract or moot question. The writ is available only where the release of the prisoner will follow as a result of a decision in his favor." (Internal quotation marks and citation omitted)).

Granted, this Court has acknowledged that the collateral consequences[3] of a criminal conviction *may* be enough to overcome mootness, at least in a direct appeal. *See Knight v. State*, 116 Nev.140, 143-44, 993 P.2d 67, 70 (2000). It has not,

[3] *Nollette v. State*, 118 Nev. 341, 344, 46 P.3d 87, 89 (2002) ("Collateral consequences . . . do not affect the length or nature of the punishment and are generally dependent on either the court's discretion, the defendant's future conduct, or the discretion of a government agency.").

however, addressed whether such an exception exists in other post-conviction matters. The State respectfully submits that it does not.

Like this Court, the United States Supreme Court has recognized that an otherwise moot case may be justiciable in a direct appeal if there are sufficient collateral consequences. *Ginsberg v. New York*, 390 U.S. 629, 633 n.2, 88 S.Ct. 1274, 1277 n.2 (1968). Nevertheless, in considering a petition for habeas corpus, the United States Supreme Court has held that "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for purposes of a habeas attack upon it." *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926 (1989). For similar reasons, the Federal Circuit Courts have routinely rejected habeas petitions filed by individuals who are in immigration detention after completing a criminal sentence because "[r]emoval proceedings are at a best collateral consequence of conviction" and "'the collateral consequences of [a] conviction are not themselves sufficient.'" *Ogunwomoju v. United States*, 512 F.3d 69, 75 (2d Cir.2008) (quoting *Maleng*, 490 U.S. at 492, 109 S. Ct. at 1926). *See also Broomes v. Ashcroft*, 358 F.3d 1251, 1255 (10th Cir. 2004) ("Because Mr. Abtew cannot challenge his expired state court conviction directly under § 2254, he likewise cannot challenge it collaterally under § 2241."). Likewise, other federal courts have rejected habeas petitions based solely upon collateral consequences, such as sex

offender registration, *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999), and loss of professional licensure. *Davis v. Nassau Cnty.*, 524 F.Supp.2d 182, 187 (E.D.N.Y.2007) ("Examples of 'collateral consequences' that do not render a petitioner in custody include the inability to obtain a license to engage in a particular profession, own or possess firearms, or hold public office." (Internal quotation marks and citation omitted).

Thus, because "the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it," *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10 (1981), the Court correctly denied Appellant's Petition as non-justiciable.

## III.
## APPELLANT IS NOT ENTITLED TO "EQUITABLE" WRIT RELIEF

Urging a "liberal jurisdictional standard," AOB 11, Appellant also contends that the district court should have considered his Petition as a matter of equity. His argument is fatally flawed.

For one, equity benefits the diligent. Although Appellant contends that he diligently pursued post-conviction remedies, many of the delays throughout the proceedings in this case were attributable to Appellant. For example, given that

Defendant primarily alleges ineffective assistance of trial counsel, it is unclear why he did not file a Post-Conviction Petition for habeas corpus any time between April 24, 2008, when the first Judgment of Conviction was filed, and February 1, 2011, when Appellant filed his first Petition. Moreover, after filing the first Petition, it took Appellant over a year to file a Supplement that was substantially similar, and then an additional seven months to file a Second Supplement.

More importantly, "[t]he fact that the writ has been called an 'equitable' remedy does not authorize a court to ignore . . . statutes, rules, and precedents." *Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 1298 (1996)). *See also Smith v. Smith*, 68 Nev. 10, 22, 226 P.2d 279, 285 (1951) (concluding that the district court did not have jurisdiction in equity "where statutes in force required [the party] to seek his relief in another way"). Here, Appellant's request for equity in contrary to Nevada law, particularly Article 6, Section 6 of the Nevada Constitution, because there is no legal authority which allows a court to grant habeas corpus to a petitioner who is no longer "in custody." As such, equitable relief would impermissively contravene the plain language of Nevada's Constitution.

Thus, as this Court previously stated in *Sparks Nugget*, "we are bound to follow the constitution's plain language even though a different result might be desirable in some circumstances." *Sparks Nugget v. State Dep't of Tax.*, 124 Nev.

159, 168, 179 P.3d 570, 577 (2008). Accordingly, this Court should reject Appellant's request for equity and instead AFFIRM the district court's decision because the district court correctly determined, as a matter of law, that habeas corpus relief was not available in this matter.

## 9. Preservation of the issue(s)

The issues on appeal were properly preserved.

## VERIFICATION

1. I hereby certify that this Fast Track Response 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 Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 4,449 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 20th day of January, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Ryan J. MacDonald*

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
P O Box 552212
Las Vegas, NV 89155-2212
(702) 671-2500

## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 20, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

TERRENCE M. JACKSON, ESQ.
Counsel for Appellant

RYAN J. MACDONALD
Deputy District Attorney

BY */s/ E.Davis*
Employee,
Clark County District Attorney's Office

RJM/Kathleen Wilde/ed