IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA M. ARMENI, JONAH J. HORWITZ, and DEBORAH A. CZUBA,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT of the STATE of NEVADA, IN AND FOR the COUNTY of CLARK; and THE HONORABLE MICHAEL P. VILLANI,

Respondents,

and

TIMOTHY FILSON, Warden, ADAM PAUL LAXALT, Attorney General for the State of Nevada, and THE STATE OF NEVADA,

Real Parties in Interest.

Supreme Court Case No.

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Underlying Case: Clark County Dist. Ct. No. 81C053867

PETITION FOR WRIT OF MANDAMUS

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ROUTING STATEMENT

This matter should be heard by the Nevada Supreme Court and not by the Nevada Court of Appeals for several reasons. First, it involves a death penalty case, in that it challenges a sanction imposed on attorneys for actions they took while representing a death-sentenced inmate in his post-conviction action. *See* NRAP 17(a)(1). Second, it relates to attorney discipline, since the petition challenges an order imposing sanctions on undersigned counsel. *See* NRAP 17(a)(4). Third, it raises an issue of statewide public importance because—as explained below—the sanctions order, if upheld, would chill the zealous representation of Nevada prisoners in post-conviction proceedings, including death row prisoners. *See* NRAP 17(a)(11).

Fourth, undersigned counsel have appealed the district court's denial of post-conviction relief in case number 73223. That appeal will be resolved by the Nevada Supreme Court, because it is clearly a capital case under NRAP 17(a)(1). The appeal is closely related to the mandamus action. Both arise out of the same order, *see* App. 508–38, involve the same attorneys, and implicate the same briefing and argument that took place below. Therefore, it would further judicial economy for both cases to be reviewed by the same tribunal. *See Pub. Emps. Ret. Sys. of Nev. v. Gitter*, 393 P.3d 673 (Nev. 2017) (en banc) (following a similar course in another case where a direct appeal intersected with a mandamus action

targeting the award of attorney fees as sanctions).[1] Finally, the case does not fall into any of the categories that are presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

ISSUE PRESENTED

The petitioners are attorneys who represent Samuel Howard, a Nevada inmate under sentence of death, in his post-conviction proceedings. Below, the district court sanctioned the petitioners in the post-conviction case sua sponte, without giving them any notice or an opportunity to be heard, and without saying anything about what rule or statute gave it the power to order the sanctions. It did so because it disagreed with the arguments the petitioners made as part of their reasonable and good-faith effort to zealously vindicate their client's constitutional rights and challenge his death sentence. In the district court's sanctions order, it required the petitioners to pay $250 directly to the Clark County District Attorney's Office, rather than to the court or to a non-profit or foundation. It thereby creating a financial incentive for prosecutors to raise unsupported allegations of misconduct, which the prosecutor in this case did repeatedly. The issue presented is whether the district court abused its discretion in awarding such sanctions.

[1] By separate motion, the petitioners will be filing a motion to consolidate this mandamus action with the appeal from the denial of post-conviction relief, as they involve closely related issues.

I. RELIEF SOUGHT

The petitioners seek an order from this Court granting a writ of mandamus and instructing the district court to vacate its order awarding attorney fees against them. If this Court calls for any further proceedings below, the petitioners also respectfully ask that the case be reassigned to a different judge, given the unwarranted hostility and bias the current judge has demonstrated against them. In the event the Court upholds the sanctions, the petitioners request an order indicating that such sanctions should not be given to the District Attorney's Office but instead to a suitable charity or foundation.

II. THE FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

The petitioners are attorneys who represent Samuel Howard in his post-conviction litigation. Two of the attorneys, Jonah Horwitz and Deborah Czuba, are public defenders who exclusively represent indigent death row inmates. The third, Paola Armeni, is a private attorney assisting in the case pro bono. Mr. Howard is a Nevada inmate who was convicted of murder and sentenced to death by a Clark County jury in 1983. *See Howard v. State*, 102 Nev. 572, 729 P.2d 1341 (1986) (per curiam) (affirming the conviction and sentence on direct appeal). Ever since, Mr. Howard has been challenging his conviction and sentence in state and federal court, through multiple post-conviction and federal habeas proceedings that are not germane here.

On October 5, 2016, the petitioners sought post-conviction relief for Mr. Howard in Clark County District Court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), a recent decision from the U.S. Supreme Court. *See* App. 22–31. The petition contained one claim (referred to here at times as "Claim One"), which alleged that under *Hurst* this Court had violated Mr. Howard's constitutional rights in 2014 in his prior post-conviction appeal when it nullified an aggravating circumstance and then reweighed the single remaining aggravating circumstance against the mitigating evidence. *See* App. 28–29. According to the petition, *Hurst* established that only a jury could weigh the evidence in this manner, and therefore a resentencing before a jury was necessary. *See* App. 28–29.

On November 2, 2016, the State filed an opposition and motion to dismiss the petition, asserting that it was procedurally barred because it should have been presented earlier. *See* App. 132–61. In this very first pleading, and based exclusively on Mr. Howard's anodyne, ten-page *Hurst* petition, counsel for the State—Jonathan E. VanBoskerck—accused his opponents of "a bad faith attempt to subvert the adversarial process" and of engaging in "skullduggery" because they had not addressed potential procedural bars arising from the timing of its filing. *See* App. 151–52. Mr. VanBoskerck did so even though the petition did in fact explain its timing, namely, because the claim was not available until *Hurst*. *See* App. 27. To further support his misconduct theory, Mr. VanBoskerck

characterized all Federal Public Defenders—which two of the petitioners are[2]—as having "an almost religiously militant opposition to the death penalty." *See* App. 151 n.9. Mr. VanBoskerck relied upon a series of cites, none of which had anything to do with the Federal Defender Services of Idaho, the only public defense entity associated with the case. *See* App. 151 n.9.

In the course of preparing their response to the State's motion to dismiss, the petitioners discovered another viable *Hurst* claim, grounded on the district court's failure at sentencing to instruct Mr. Howard's jury that it had to find the aggravation outweighed the mitigation by a reasonable doubt. *See* Ex. 1, at 1.[3] Consistent with the local convention, which the petitioners explored through extensive research, *see* App. 209–10, 227, they filed an amended petition without seeking leave in advance on December 1, 2016, within two months of the original petition, *see* App. 164–75. The amended petition contained both Claim One,

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[2] The third petitioner is Paola Armeni, who is in private practice and is serving as local counsel for Mr. Howard's Idaho-based Federal Defender attorneys. Because the Federal Defender attorneys had primary responsibility for litigating the post-conviction action, this petition will refer to Mr. Howard's counsel as public defenders.

[3] A petition for writ of mandamus initiates an original proceeding in this court. *See, e.g.*, *Lund v. Eighth Jud. Dist. Ct.*, 127 Nev. 358, 359, 255 P.3d 280, 282 (2011). Hence, there is no prohibition on the introduction of evidence. If the Court sees things differently, the petitioners still cannot fairly be held accountable for the limitations of the record below, since they were never given an opportunity to be heard on the sanctions. Had the district court provided them with notice, they would have informed it of the same facts contained in the attached declaration.

directed to the appellate reweighing, and Claim Two, directed to the jury weighing. *See* App. 170–75.

Departing from its nearly universal practice, the State filed a motion to strike the amended petition, insisting that Mr. Howard had an obligation to pursue leave in advance. *See* App. 180–204. Mr. VanBoskerck reiterated his enmity toward the Federal Defenders in his motion, stating again his view that they had "an almost religiously militant opposition to the death penalty." *See* App. 197. The petitioners submitted a response to the motion to strike, explaining their position that no request for leave was required. *See* App. 205–31. If the district court ruled to the contrary and found an obligation to seek leave, Mr. Howard asked in the alternative that leave be granted. *See* App. 212–23.

The State offered a reply in support of its motion to strike, setting forth its belief that Federal Defender officers were engaged in a large and sinister conspiracy to raise *Hurst* claims. *See* App. 232–63. It detected such a conspiracy because seventeen other Nevada inmates who were represented by *other* Federal Defender offices with no connection to Idaho's had also seen the importance of *Hurst* claims and filed petitions *after* Mr. Howard's. *See* App. 248–49. The State further contended that the *Hurst* petitions were part of an "intentional attempt to delay capital habeas litigation," App. 248, even though he had been informed that Mr. Howard had not asked for a stay of his federal habeas case and it was the

unsuccessful conclusion of that case that would likely trigger an execution date, *see* App. 219.

On March 17, 2017, a hearing was held on the motion to strike. *See* App. 353–71. At the hearing, the district court considered the arguments of the parties and then announced that it was "granting the motion to strike the amendment." App. 362. The district court said nothing about denying leave to amend. Later on in the hearing, the petitioners noted, "if the motion to strike was granted on the basis that we didn't seek leave in advance of filing the amended petition, we would ask for an opportunity to file a formal motion seeking leave to add the second claim." App. 365. The district court responded, "All right. Thank you." App. 365.

On April 6, 2017, the petitioners filed a motion for leave to add the second claim by amendment. *See* App. 372–438. They did so on the assumption that the earlier amended petition had been struck precisely because leave had not been requested, and they wished to rectify the omission. *See* App. 373 ("On March 17, 2017, the Court struck the amended petition because Mr. Howard did not seek leave before filing it. Their assumption was supported not only by the district court's comments at the hearing, but also by the proposed order striking the amended petition, which had already been sent to them by the State, and which was entered on April 7, 2017. *See* App. 439–42. The order characterized the

amended petition as having been "struck from the record pursuant to NRS 34.750(5) and *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006)," App. 439, both of which had been cited by the State for the proposition that a request for leave was required, *see* App. 198 (insisting that the "failure to seek leave and proffer good cause" violated "NRS 34.750(5) and *Barnhart*"). Like the court's oral ruling, the proposed order did not indicate that leave to amend was being denied. *See* App. 439. The proposed order submitted by the State was signed by the court without any changes. *See* App. 439.

The State opposed Mr. Howard's motion to amend. *See* App. 443–64. It contended that the motion to amend was effectively a motion for reconsideration of the order striking the petition. *See* App. 456–58. As such, the motion could not be filed—in the State's judgment—without seeking leave in advance. *See* App. 457–58. The State did not mention that the motion to amend clearly sought *leave* to amend, *see* App. 373 ("Mr. Howard therefore *seeks leave* now." (emphasis added)), meaning that the State was essentially chastising the petitioners for not filing a motion for leave to file a motion for leave. In the petitioners' reply in support of amendment, they pointed that out, and also pointed out that Mr. Howard was requesting leave to amend precisely because the court had earlier struck his petition on the basis that he had not requested it before. *See* App. 467–73.

While the parties were litigating the amendment issue, briefing on Mr. Howard's request for relief on Claim One—the appellate-reweighing claim—continued. On that front, the petitioners filed on March 27, 2017, a reply in support of the petition (hereinafter "the Reply") combined with a response to the State's motion to dismiss. *See* App. 264–307. The petitioners included in the Reply several arguments about the reasonable-doubt standard. For instance, with respect to procedural bar, the petitioners explained that—contrary to the State's argument—they could not have brought Claim One earlier and based it on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), because it was *Hurst* that incorporated a reasonable-doubt standard into the relevant body of law. *See* App. 276–77. On the question of *Hurst*'s retroactivity, the petitioners also depended upon reasonable-doubt arguments. Specifically, they contended that even though *Ring* was not retroactive, it did not—unlike *Hurst*—examine any reasonable-doubt issues, and it was that aspect of *Hurst* that made it retroactive. *See* App. 292–96. Finally, on the merits, the petitioners submitted that this Court violated *Hurst* because it did not use a reasonable-doubt standard in its 2014 reweighing of aggravation and mitigation. *See* App. 299.

On April 19, 2017, the district court generated a document entitled "court minutes," with the heading of "journal entries." App. 475–77. The document stated that Mr. Howard had filed a motion for leave to amend "without leave of the

Court and directly after the Court struck Petitioner's Amended Fifth Petition and did not grant leave to Amend." App. 475. It then stated:

> At the March 17, 2017 hearing this Court inquired from Petitioner's counsel, Mr. Horowitz [sic] as to the procedures followed by the Federal judges he usually appears in front of and it was stated that rules are adhered to. The Court advised all counsel that it was this Court's intention to follow the procedural rules as well. It is Hereby Ordered that Petitioner's Motion to Amend or Supplement his Fifth Petition for Writ of Habeas Corpus is DENIED. It is FURTHER ORDERED that sanctions are imposed against Petitioner's counsel for attorney fees in the amount of $250.00 in which the State incurred for having to respond to Petitioner's additional Motion to Amend after this Court denied such on March 17, 2017 and prior leave was not obtained.

App. 475–76. Immediately thereafter, the court added: "Therefore, the Court disregards Petitioner's improperly raised argument contained within its Reply filed 3/27/17 and only addresses the substantive claims in his properly filed Petition." App. 476. The court went on to deny relief on Claim One. App. 476–77. On May 15, 2017, the court memorialized its findings in a final order. *See* App. 508–38.

Mr. Howard filed a notice of appeal to challenge the district court's rejection of his post-conviction claims on June 11, 2017, *see* App. 549–51, which has been assigned case number 73223. Undersigned counsel are now submitting the instant petition for writ of mandamus to reverse the district court's unwarranted and improper sanctions.

III. STANDARD OF REVIEW

As a general matter, mandamus can be invoked "to control an arbitrary or capricious exercise of discretion." *Ivey v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 16, 299 P.3d 354, 357 (2013) (en banc). Sanction awards are reviewed for an abuse of discretion. *See Gitter*, 393 P.3d at 681. However, where the sanctions "decision implicates a question of law, the appropriate standard of review is de novo." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 616 (2014) (en banc). In capital cases in particular, the Court's determination to avoid "chilling or unduly temporizing ethical representation by counsel will inevitably trigger a heightened appellate concern and scrutiny when a trial court imposes monetary sanctions on counsel for a client facing the death penalty." *Young v. Ninth Jud. Dist. Ct.*, 107 Nev. 642, 649, 818 P.2d 844, 850 (1991) (per curiam).

IV. THE PETITION IS TIMELY AND COGNIZABLE

There is no deadline for mandamus petitions. *See* NRAP 21. The timeline is controlled only by the doctrine of laches. *See State v. Eighth Jud. Dist. Ct.*, 118 Nev. 140, 147–48, 42 P.3d 233, 238 (2002) (en banc) (per curiam). Laches turns on three factors: "(1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances

causing prejudice to the respondent." *Id.*, 118 Nev. at 148, 42 P.3d at 238. Each of the factors favors a conclusion that the petitioners here were timely.

First, they are filing the petition within sixty days of the final order imposing the sanctions, which is plainly timely under this Court's caselaw. *See id.* (finding a writ petition timely where it was filed less than four months after the triggering event); *see also Moseley v. Eighth Jud. Dist. Ct.*, 124 Nev. 654, 659 n.6, 188 P.3d 1136, 1140 n.6 (2008) (per curiam) (rejecting a laches defense where the petition was filed approximately four months after the triggering event); *Widdis v. Second Jud. Dist. Ct.*, 114 Nev. 1224, 1227–28, 968 P.2d 1165, 1167 (1998) (per curiam) (holding that the petitioner was not barred by the doctrine of laches due to his seven-month delay in filing).

The petitioners only took even that modest amount of time because of urgent duties in other cases. *See* Ex. 1, at 1–2. In addition, the petitioners did not acquiesce in the sanctions order. To the contrary, they made it immediately known to the State and to the district judge that they would be calling upon this Court to review the sanctions. *See* App. 550. Finally, there has been no prejudice to the State. It received its check in the interim, *see* App. 550, and has suffered no

adverse consequences from the short period that has elapsed. Accordingly, laches does not bar the petition.[4]

Nor do cognizability concerns. For it is well-established that mandamus proceedings are the appropriate means to contest sanctions imposed against attorneys. *See Watson Rounds, P.C. v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d 228, 231 (Nev. 2015) (en banc) ("Sanctioned attorneys do not have standing to appeal because they are not parties in the underlying action; therefore, extraordinary writs are a proper avenue for attorneys to seek review of sanctions; *accord Gitter*, 393 P.3d at 681; *Haley v. Eighth Jud. Dist. Ct.*, 128 Nev. Adv. Op. 16, 273 P.3d 855, 857 (2012)).

V. REASONS FOR GRANTING THE WRIT

The district court's sanction award was inappropriate and unlawful on multiple levels. First, the pleadings for which the petitioners were fined were submitted as part of a legitimate—and indeed necessary—effort to ensure that their

[4] The petitioners sent the District Attorney's Office a check in the amount of the sanctions, while making it known that they were not conceding the validity of the sanctions and would be contesting them in a mandamus action, in which the petitioners would be requesting a judicial order commanding the return of the money. *See* App. 550. Because the petitioners clearly expressed their intentions to the State, and because this Court has the power to order the money returned, the controversy is a live one and must be resolved. *See Corley v. Rosewood Care Ctr.*, 142 F.3d 1041, 1057 (7th Cir. 1998) ("Payment of the sanction does not moot the appeal because the appellate court can fashion effective relief to the appellant by ordering the sum paid in satisfaction of the sanction be returned.").

death-row client's constitutional claims were preserved. Second, the district court did not enter any findings even remotely sufficient to justify the sanctions. Third, the district court failed to provide the petitioners with any notice or opportunity to be heard before they were sanctioned, in violation of the law's most basic requirements. Fourth and finally, even if the sanctions award was proper—which it manifestly was not—it should not be payable to the District Attorney's Office, lest its prosecutors be given a perverse incentive to make baseless accusations of misconduct against public defenders who are attempting to zealously represent their clients. Collectively, these factors require the Court to vacate the sanctions and—if any remand is necessary—to reassign the matter to a different judge.

A. The Petitioners Did Nothing Sanctionable

The most straightforward reason to vacate the sanction is quite simply that it was unfounded. In fining the petitioners, Judge Villani punished them for asserting good-faith arguments on behalf of their death-sentenced client—arguments they were ethically *required* to make. To uphold such an order would be to send a dangerous message to capital defense attorneys in particular, and criminal defense attorneys in general, that zealous representations endangers their reputations.

The message is made even more problematic by the status of Mr. Howard's attorneys. One is a lawyer in private practice who is working on Mr. Howard's

case pro bono. Such attorneys should be encouraged to lend their services to indigent prisoners, who badly need competent representation. They will not be incentivized to assist if they know that zealous advocacy exposes them to potential sanctions. Mr. Howard's other two attorneys work for a unit that exclusively serves death row inmates. *See* Ex. 1, at 1. It is essential that such lawyers feel free to provide the most thorough, energetic advocacy they can. *See Young*, 107 Nev. at 649, 818 P.2d at 850. If they do not, individuals will suffer the highest price imposed by the law—their death—without a searching, constitutional review of their cases. Lawyers who face a constant threat of sanctions are not lawyers who will offer that level of representation.

As a preliminary matter, it is not entirely clear why the district court sanctioned the petitioners. In the journal entry where it originally mentioned sanctions, the court suggested that the petitioners had engaged in misconduct by filing a motion for leave to amend after the amended petition had been struck. *See* App. 475–76. However, the court's final order indicates that the petitioners were fined because they included arguments about the reasonable doubt standard in their reply in support of the post-conviction petition, when the court believed such arguments were only relevant to Claim Two, which had been struck from the petition. *See* App. 528–29. Because the signed order cites only the reasonable-doubt point, and because that order was the formal judgment of the court, the

petitioners regard it as the only basis for the sanctions that they must overcome. *See Div. of Child & Family Servs. v. Eighth Jud. Dist. Ct.*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (per curiam) (describing minute orders as "ineffective for *any purpose*" (emphasis in original)); *Mortimer v. Pac. States Saving & Loan Co.*, 62 Nev. 142, 154, 145 P.2d 733, 735 (1944) ("The formal written order signed by the court, must, we think, supersede the minute order entered by the clerk."). Nevertheless, in an abundance of caution, the petitioners will address both rationales.

Turning to the court's first justification for the sanctions, it suggested that the petitioners committed misconduct by filing a motion for leave to amend after the amended petition was struck. *See* App. 528–29. In offering that suggestion, the court appeared to be embracing the State's argument that the order striking the petition also denied leave to amend the petition, and that the motion to amend was in effect a motion for reconsideration. *See* App. 455–58. Because it was a motion for reconsideration, the State insisted, leave had to be sought in advance of its filing. *See* App. 455–58.

The State's logic—which was evidently adopted by the court in its journal entry—was flawed. To begin, it is peculiar that the petitioners would be sanctioned for not seeking leave to file a motion that was seeking *leave* to amend.

Surely the petitioners were not obligated to request permission to request permission.

Furthermore, the State's reading of the record was, at a bare minimum, highly contestable. The order in question stated only that the amended petition was "struck." App. 439. Similarly, the court stated in its oral ruling that it was "granting the motion to strike." *See* App. 362. In neither place did the court say anything about refusing leave to amend. Indeed, the petitioners informed the court at the March 17, 2017 hearing that "if the motion to strike was granted on the basis that we didn't seek leave in advance of filing the amended petition, we would ask for an opportunity to file a formal motion seeking leave to add the second claim." App. 365. The court responded, "All right," App. 365, which could hardly have put the petitioners on notice that they were being denied leave to amend at that hearing.

That straightforward interpretation of the procedural history of the case is also the most sensible one in light of the pleadings. When it struck the amended petition, the court was granting the State's motion. The very first line of the argument section of that motion summed up the State's position: "This Court should strike the Amended Fifth Petition because Petitioner failed to seek leave of court to file a supplemental pleading and ignored his obligation to allege good cause to amend." App. 195. It was *that* argument that the court validated on

March 17, 2017 when it granted the motion. What is more, although there was some debate in the motion-to-strike litigation over whether Mr. Howard could be granted leave to amend, *see* App. 212–23, the order itself did not settle that debate, as it limited itself to striking the amended petition, *see* App. 439.

In sum, by filing the motion for leave to amend, the petitioners were doing precisely what the State and the court had faulted them for not doing before: they were seeking leave and alleging good cause to amend. Far from behaving disobediently, the petitioners were striving to *comply* with the district court's ruling, which informed them that they *had* to seek leave to amend. It was exceedingly unfair to penalize the petitioners for taking the exact step the court and the State told them they had to, and it would compound the unfairness to uphold the sanctions now.[5]

The district court's other basis for the sanctions was that the petitioners were precluded from making arguments about the probable-cause standard in support of Claim One, because such arguments went only to Claim Two and Claim Two was struck. *See* App. 527–29. That basis likewise cannot sustain the sanctions.

[5] Ironically, the court's order also compelled the petitioners to compensate the State for the expenditure of "valuable prosecutorial resources," App. 529, in responding to their motion to amend when it was the State itself that forced the petitioners to file such a motion by insisting that it was required, *see* App. 180–204, notwithstanding its deeply entrenched habit of allowing amended petitions to go forward without leave, *see* App. 209–10, 227.

To begin, it is true that Claim Two explicitly cited the reasonable-doubt standard, whereas Claim One did not. *See* App. 170–72. But that was not the fundamental difference between Claims One and Two. Rather, the true distinction relates to the phase of the proceeding that the claims are respectively tethered to. Claim One was geared toward the *appellate* reweighing of aggravation against mitigation that this Court conducted in its 2014 decision. App. 170–71. It alleged that such reweighing violated *Hurst* because it should have been committed to a jury. App. 170–71. Claim Two, by contrast, was geared to the weighing of aggravation against mitigation undertaken by the *jury* at Mr. Howard's sentencing. App. 171-172. It contended that such weighing should have been done under the beyond-a-reasonable-doubt standard pursuant to *Hurst*. App. 171–72. In other words, Claim One alleged that the appellate reweighing conflicted with *Hurst* and Claim Two alleged that the jury weighing conflicted with *Hurst*.

Understood in these terms, the argument that the petitioners were foreclosed from making in their Reply, due to the striking of their amended petition, was an argument that the jury process in his capital sentencing ran afoul of *Hurst*. And in full compliance with the district court's ruling, they did not make that argument. *See* App. 264–307. Instead, they argued that the appellate reweighing in his case ran afoul of *Hurst*, *see* App. 264–307, the claim they had included in their original

petition, *see* App. 28–29, and were required to brief, *see* App. 369. To bolster *that* argument, the petitioners relied upon reasonable-doubt law.

They did so in several ways. First, because the appellate reweighing took place before *Hurst*, Mr. Howard would only be entitled to relief if the decision were retroactive. *Hurst* was founded in part on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). For its part, *Ring* has been deemed non-retroactive. *See Schriro v. Summerlin*, 542 U.S. 348, 357, 124 S. Ct. 2519, 2526 (2004); *Colwell v. State*, 118 Nev. 807, 822, 59 P.3d 463, 473 (2003) (en banc) (per curiam). Thus, for their client to enjoy the benefit of *Hurst*, the petitioners had to distinguish its retroactivity from *Ring*'s. They did so by emphasizing that *Ring* did not deal with the burden of proof, whereas *Hurst* did, and that cases involving reasonable doubt have been found retroactive. *See* App. 292–96.

Second, the petitioners made substantive use of *Hurst*'s reasonable-doubt component. Their Reply pointed out that this Court did not specify what standard it employed in its reweighing. *See* App. 295. The Reply further noted that the Court's established practice was to put itself in the shoes of the jury when reweighing, and that capital juries in Nevada did not follow the reasonable-doubt test at sentencings. *See* App. 295. Accordingly, the petitioners inferred that the Court failed to follow a reasonable-doubt standard in its reweighing, thereby violating *Hurst*. *See* App. 295–96.

The court below was certainly within its rights to reject the petitioners' reasonable-doubt arguments, though Mr. Howard will contest its decision to do so in his appeal from the denial of post-conviction relief. It did not have the right, though, to punish his attorneys for advancing such arguments in good faith. As outlined above, the reasonable-doubt sections of the Reply were all written to strengthen Claim One, a claim that the petitioners were allowed to advocate for. *See* App. 370. It is troubling that the district court would issue a post-hoc condemnation of the petitioners for offering viable arguments challenging a death sentence. Tellingly, the petitioners drafted the language on reasonable doubt when they were preparing a reply in support of Claim One alone. *See* Ex. 1, at 1. In fact, that is what alerted counsel to the existence of Claim Two. *See id.* Considering those facts, it was incorrect of the district court to simply assume that the petitioners were trying to sneak in a barred argument—they planned all along to use the argument as support for a claim that was never taken off the table.

The district court's decision to punish the petitioners for making good-faith arguments in support of their client's constitutional claim raises exceptionally troubling questions about the right to access the courts and the right to freedom of speech. *See Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 1494 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). Claim One was indisputably an appropriate subject for the Reply.

Indeed, it was the *only* subject of the Reply. If the petitioners are forbidden from making an argument they deem fit in support of a claim that are *required* to support, it is difficult to see how their death row client's right to access the courts is being protected in any meaningful way. Quite to the contrary, the district judge closed the courthouse door to the petitioners' argument merely because it looked to him too similar to an entirely separate claim that the petitioners were not addressing. Such sanctions, if upheld, will immeasurably chill the representation given to capital defendants, and may well chill the representation given to *all* litigants.

Below, the petitioners discuss the complete absence of notice and an opportunity to be heard on the sanctions, which constitutes a serious violation in its own right. *See infra* at 40–46. It is an even more profound violation on the reasonable-doubt issue. At the hearing on the motion to strike, the district court specifically asked the petitioners whether their reasonable-doubt theory was relevant to Claim One. *See* App. 365. The petitioners acknowledged that the theory was "more essential" to Claim Two, but that it was "still an issue" with respect to Claim One because "with the extension of *Hurst* there is now a reasonable doubt requirement that has been imposed on that weighing process." App. 365. The district court responded, "All right." App. 365. In his comments, the prosecutor never suggested that reasonable doubt was off limits on Claim One.

Instead, he himself addressed reasonable doubt in arguing *against* Claim One. *See* App. 367. The petitioners were given absolutely no basis to believe that they were prohibited from discussing reasonable doubt in connection with Claim One. Far from it: they were *encouraged* by both the court and the State to consider reasonable doubt a valid area of inquiry in the analysis of Claim One. Under those circumstances, it is disturbing in the extreme that the district court would later sanction the petitioners for simply making their argument in support of a claim that remained in the petition.

The petitioners will not explain at length why they regard the reasonable-doubt arguments as relevant to Claim One. They do not believe they have any obligation to offer such an explanation, as they were plainly entitled to make whatever arguments they saw fit in support of their claim, so long as the argument was not frivolous, and no one has said that it was. However, they will briefly set forth the relevance of the argument for the Court. A more detailed elaboration will come in Mr. Howard's opening brief in the appeal from the district court's denial of post-conviction relief, which the petitioners believe should be consolidated with the instant mandamus proceeding, as will be requested in a separate motion.

The viability of the arguments is proven by persuasive, on-point authority. As the petitioners discussed below, the Delaware Supreme Court termed *Hurst* retroactive in part because of this very reasonable-doubt element. *See* App. 294

(citing *Powell v. Delaware*, 153 A.3d 69, 73–74 (Del. 2016)). The petitioners cannot reasonably be faulted for pressing such foreign cases into the service of their death-sentenced client, especially on an issue—the retroactivity of *Hurst*—that had not yet been resolved by the Nevada Supreme Court. In *Gitter*, this Court reversed an attorney-fee sanction because the attorneys' pleadings were "based upon novel and arguable, if not ultimately successful, issues of law." 393 P.3d at 682. The same is true here.

Judge Villani commented in his order that he was imposing sanctions because it was the court's "intention to follow the procedural rules." App. 529. But there is no procedural rule that says a death row inmate cannot file a motion to amend in a claim after having an amended petition struck on the ground that he failed to seek leave. And there is certainly no procedural rule that says a death row inmate cannot make a reasonable-doubt argument in support of a *Hurst* challenge to appellate reweighing. The nameless "procedural rules" invoked by the district court simply do not exist. In referring to these rules, the district court may have had in mind the requirement that a litigant seek leave before pursuing reconsideration, since that was the only rule it mentioned. *See* App. 528. However, the petitioners were not pursuing reconsideration. They were asking to amend a petition where leave to amend had not clearly been denied, and they were making the best arguments available to them in support of a post-conviction claim

that was undisputedly in the operative petition. Even if the district court were correct that the petitioners were effectively seeking reconsideration—which they definitively were not—there is no rule that allows for the imposition of sanctions on the ground that a litigant is as a practical matter requesting reconsideration, despite his own belief that he is not, and doing so without leave. The proper result in such a case would be simply to deny relief. To take money from a public defense institution and give it to a prosecutor's office under such circumstances is wildly disproportionate to the perceived violation, even in a situation where—unlike here—the violation actually occurred.[6]

[6] The district court did not intimate in its order that the petitioners were being sanctioned for filing an amended petition without seeking leave in advance. That rationale cannot support the sanctions either. The petitioners filed their amended petition without requesting leave after doing extensive research into Clark County practice and discovering that no leave was sought in an overwhelming number of post-conviction cases, without any protest from the State or the courts. *See* App. 209–10, 227. They would have been happy to file a motion for leave to amend, App. 228, and refrained from doing so only out of their eminently good-faith belief that such motions were unnecessary, and—given their scarcity—potentially even disfavored. Furthermore, the statute relied upon below for the requirement to seek leave addresses only situations in which a pro se petition is filed by the inmate, who is then appointed counsel by the state district court. *See* NRS 34.750; App. 207. That does not apply here, where counsel filed the initial petition and were not appointed by the state district court. *See* App. 22– 31. Finally, the only caselaw relied upon below for the requirement to seek leave involved a prisoner who raised new claims orally at an evidentiary hearing without including them in *any* petition, thereby depriving the State of an opportunity to respond to it. *See Barnhart*, 122 Nev. at 303, 130 P.3d at 651. Here, by contrast, the new claim was included in a written and filed petition which gave the State plenty of time to engage with it, as it did at length. *See* App. 164–75; App. 180– 204; App. 443–64. It was accordingly reasonable to file the amended petition without seeking leave in advance. Indeed,

Lastly, an order from this Court affirming the sanctions would send a dangerous message to capital defense attorneys that zealous representation jeopardizes their good standing before the courts. In capital post-conviction matters such as this one, counsel labors under an ethical duty "to litigate all issues, whether or not previously presented, that are arguably meritorious." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted at 31 Hofstra L. Rev. 913, 1079 (2003) (hereinafter "Guidelines"); *see id.* at 919–20 (indicating that the Guidelines apply to all attorneys, including those in federal public defender offices, "who act on behalf of the defendant in a capital case"). As part of that responsibility, counsel must "make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review." *Id.*

Claim Two undeniably satisfies the low bar of being "arguably meritorious." The theory behind Claim Two is that *Hurst* extends to the phase of a capital trial at which the jury weighs aggravation against mitigation and determines whether to return a death sentence. *See* App. 171–72. That theory has been embraced by the

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these facts further demonstrate the unfairness of the sanctions. The petitioners did not seek leave based on a credible reading of the governing law and on the basis of the State's and the district court's longstanding acquiescence to the identical approach in numerous other cases. They were then punished for taking that approach, and then punished again for trying to remedy the problem and conform to the newly invented obligation to seek leave. In short, they were lulled into a trap by both the State and the district court.

Delaware and Florida Supreme Courts, resulting in the emptying of Delaware's death row, *see Powell*, 153 A.3d at 71–75, and to large numbers of capital resentencings in Florida, *see Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 2017 WL 635999 (2017); Death Penalty Information Center, Florida death-row appeals that have been decided in light of Hurst, available at https://deathpenaltyinfo.org/node/6785 (indicating that seventy-seven Florida inmates have had their death sentences set aside under *Hurst* as of this writing). Because of *Hurst*'s significance to the capital litigation universe, the petitioners incontrovertibly had an obligation to preserve it.

In large measure, preserving an issue means, in this context, protecting the inmate's ability to raise it in a federal habeas proceeding. *See* Guidelines, 31 Hofstra L. Rev. at 1030 (discussing "the heightened need to fully preserve all potential issues for later review" in capital cases and how it applies to state post-conviction counsel); *cf. Martinez v. Ryan*, 566 U.S. 1, 12, 132 S. Ct. 1309, 1317–18 (2012) ("Effective trial counsel preserves claims to be considered on appeal, and in federal habeas proceedings." (internal quotation marks omitted)). To preserve a claim for federal habeas review, it must first be fully exhausted at every level of the state court system. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732 (1999).

Guided by those principles, the petitioners were duty-bound to vigorously assert Claim Two below and to do everything within their power to ensure that it was adjudicated in such a way that they could later litigate it in federal court. That duty accounts for both of the actions that are potentially at the root of the sanctions order: (1) filing a motion to amend in Claim Two after the district court struck the amended petition; and (2) incorporating arguments about reasonable doubt in support of Claim One.

With respect to the former, the petitioners were ethically required to make absolutely certain that leave to amend in Claim Two was denied by the district court, so that they could appeal the issue here and then assert it in federal habeas. On the day they filed the motion to amend, they had no reason to assume that amendment had already been denied. The district court had only "struck" the amended petition. App. 439. It said nothing in either its written order or its oral ruling about denying leave to amend. *See* App. 362, 439. Considering the fact that the State's motion to strike was based on the very idea that the petitioners were required to seek leave to amend—and had not done so—they had a surpassingly good-faith basis for believing that amendment had in fact not been denied.

Given those circumstances, if the petitioners had refrained from filing a motion for leave to amend, the State could well have argued in federal habeas that the petitioners had not exhausted Claim Two, as they had not taken every step

within their means to "give [the] state courts a *fair* opportunity to act on their claims." *O'Sullivan*, 526 U.S. at 844, 119 S. Ct. at 1732 (emphasis in original). An instructive example comes from *Redenius v. Palmer*, No. 3:14-cv-538, 2017 WL 663293 (D. Nev. Feb. 16, 2017). There, the petitioner first raised a claim in his opening brief after the post-conviction evidentiary hearing, and also moved to amend the petition to add the claim. *See id.* at *4. The post-conviction court did not rule on the motion to amend but dismissed the claim, in part because it was raised too late. *See id.* In federal habeas, the State characterized the claim as unexhausted. *See id.* The federal district court disagreed, finding the claim exhausted and relying in part on the fact that "the state courts had a fair opportunity to act on this claim *because Petitioner had filed a motion to amend the supplemental petition*." *Id.* at *5 (emphasis added).

Had the petitioners here declined to file a motion to amend, they would have found themselves in the position that Mr. Redenius narrowly escaped: arguing weakly for exhaustion even though he had a chance to formally move for amending in the claim and passed on it. The petitioners should not be punished for taking reasonable steps to protect their death row client's position in federal habeas. It also bears observation how unseemly it would be for the State to reap a financial dividend from the petitioners' attempt to exhaust their claim when—in the absence of that attempt—it would likely have fought for a finding of non-

exhaustion for that very omission, just as it fought below for an order striking the amended petition because no leave had been requested. Stated differently, such a sanctions award would chill zealous representation while simultaneously inviting the State to extract a litigation benefit from the chill. That would be severely inequitable.

In fact, a significant harm has already been inflicted on the petitioners by the very imposition of the sanctions. The district court's order has forced the petitioners to expend valuable time and resources in pursuing this mandamus action, time and resources that would otherwise have been spent on the constitutional claims of their death-sentenced clients. While the damage that has been done cannot be undone, this Court should step in to at least prevent the sanctions from rippling out to adversely affect other capital cases, as well as to remedy the unjustified reputational injury that the petitioners would otherwise face.

The other basis for the sanctions, the petitioners' use of reasonable-doubt arguments in defense of Claim One, is flawed for the same reasons. *See* App. 528–29. Earlier, the petitioners described their good-faith basis for asserting those points, which establishes that they were "arguably meritorious" and that they had an ethical obligation to raise them. *See supra* at 16–24. To reiterate, Claim One alleged that the appellate reweighing conducted by this Court in 2014 was inconsistent with *Hurst*. *See* App. 28. Part of the source of the inconsistency, as

set forth in the reply, was that *Hurst* dictated a reasonable-doubt standard for the weighing of aggravation against mitigation and this Court did not apply such a standard. *See* App. 295–96. The reply also contended that *Hurst* applied retroactively to the appellate reweighing, in part because *Hurst* dealt with reasonable doubt and reasonable doubt cases are retroactive. *See* App. 292–96.

As with the motion for leave to amend, the petitioners were ethically required to make these arguments, because they supported a viable challenge to their client's death sentence. The first point—that this Court's reweighing did not comport with the reasonable-doubt test—had to be presented to every level of the Nevada judiciary so that it could be preserved for federal habeas purposes. *See Cooper v. Neven*, 641 F.3d 322, 327 (9th Cir. 2011) ("In order to fairly present a claim, the petitioner must clearly state the federal basis and federal nature of the claim, along with relevant facts.").

Likewise, the second point was a vital component of the petitioners' retroactivity theory. And if the petitioners do not persuade the courts to give *Hurst* retroactive effect, their client gets nothing from the decision, since it post-dated the appellate reweighing. *Compare Asay v. State*, 210 So. 3d 1, 13 (Fla. 2016) (concluding that *Hurst* applies retroactively to cases that became final after the issuance of *Ring*), *pet. for cert. filed* (16-9033) (May 5, 2017); *Powell*, 153 A.3d at 71–75 (finding *Hurst* retroactive to all cases), *with Chinn v. Jenkins*, No. 3:02-cv-

512, 2017 WL 631412, at *3–4 (S.D. Ohio Feb. 13, 2017) (declining to find *Hurst* retroactive). As a good-faith argument that credibly challenged Mr. Howard's death sentence, the theory had to be raised by the petitioners, *see supra* at 26, and they should not be punished for doing so.

The compelling reasons for the Court to err on the side of encouraging—rather than chilling—zealous capital defense are thoroughly surveyed in *Young*. Although the Court ultimately sustained the sanctions imposed in that case, under the unique facts before it, the opinion includes a helpful recitation of why capital defense attorneys should not be penalized for robustly advancing their clients' rights. In particular, the Court noted that it was "fully cognizant of the vigorous, diligent advocacy demanded of defense counsel in representing capital defendants." *Young*, 107 Nev. at 648, 818 P.2d at 848. It quoted with approval the American Bar Association's recognition that "the death penalty differs from other criminal penalties in its finality," meaning that "defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused." *Id.* To allow for such efforts, "[c]ourts must be vigilant in assuring that a defendant's right to effective counsel is not unduly circumscribed by judicial constraints that deny counsel ample latitude to fairly and effectively pursue and present the client's legal defenses." *Id.*, 107 Nev. at 649, 818 P.2d at 848. The Court concluded its opinion with the following admonition:

> Although we have concluded that the instant record justifies the action taken by the district court in imposing sanctions against Mr. Young for interjecting groundless delay in a matter of substantial importance, we continue to expect that our trial judges will exercise circumspection in the imposition of such sanctions in death cases. Our concern over the prospect of chilling or unduly temporizing ethical representation by counsel will inevitably trigger a heightened appellate concern and scrutiny when a trial court imposes monetary sanctions on counsel for a client facing the death penalty.

Id., 107 Nev. at 649, 818 P.2d at 850. All of these considerations are critical with respect both to public defense attorneys, which two of Mr. Howard's lawyers are and which the *Young* attorneys themselves were, and with respect to pro bono attorneys, which Mr. Howard's third lawyer is. The job of public defenders is to argue for their clients' constitutional rights, and they ought not to be reprimanded for it. Similarly, the criminal justice system is greatly benefitted when private attorneys sacrifice their own valuable time to represent impoverished defendants without compensation. Such attorneys should be rewarded for the sacrifice, not harassed with groundless sanctions. An opinion from this Court upholding the sanctions will inform the Nevada bar that they should either stay away entirely from capital defense, or that they should be as meek and timid as possible if they do get involved. Either message will deter vigorous representation where it is needed most—when a man's life depends upon it.

Young's caution went unheeded by the district court here. Far from showing increased "circumspection" out of respect for the severity of the penalty at stake,

the court showed less, punishing the petitioners for advancing reasonable challenges to their client's death sentence. Such an approach creates the very "chilling" of "ethical representation" that *Young* warned against, and the sanctions should be summarily vacated.

B. The District Court Did Not Adequately Justify The Sanctions

For the reasons set forth in the preceding section, the petitioners did not engage in any conduct that would fairly trigger the imposition of sanctions against them. That being the case, the sanctions should be vacated and there is no need for any further proceedings below. In the event this Court disagrees, is it nonetheless prevented from affirming the sanctions because the trial judge made insufficient findings to support them.

The district court's sanction award is obscure in several respects. It is not evident whether the order fines the petitioners for filing a motion for leave to amend, for making reasonable-doubt arguments, or both. *See* App. 528–29. If the former, it is not evident why the district court rejected the petitioners' argument that leave to amend had not yet been denied, a point they gave it the opportunity to consider. *See* App. 373. If the latter, it is not evident why the district court felt the petitioners were prohibited from discussing the reasonable-doubt standard in connection with Claim One, even though the district court permitted them to brief

the claim, *see* App. 370, and the petitioners comprehensively explored why the claim implicated their reasonable-doubt arguments, *see supra* at 20.

Similarly, it is not apparent what authority the district court relied upon to impose sanctions. The passage of the journal entry in which the court first invoked sanctions mentions no statutes, rules, or caselaw of any kind. *See* App. 475–76. As for the signed order, it refers to Rule 13(7) of the District Court Rules of Nevada and Rule 7.12 of the Eighth Judicial District Court Rules. *See* App. 528. Neither provision says anything about sanctions.[7] It is consequently unknown whether the district court sanctioned the petitioners pursuant to Rule 7.60 of The Rules of Practice for the Eighth Judicial District Court of the State of Nevada (hereinafter "EDCR"), NRCP 11, NRS 7.085, NRS 18.010, SCR 99(2), SCR 39, some combination thereof, or some other entirely different provision.[8] That in itself is a serious problem, for these authorities are not interchangeable. *See*

[7] The rules forbid parties from renewing motions without leave. As outlined above, the petitioners did not do so. They filed a motion to amend after being told that they were required to and they relied on reasonable-doubt arguments in support of a claim that they were instructed to brief. In neither case were they renewing a denied motion.

[8] There are also a number of sanctions rules that relate to specific legal areas not at issue here. *See, e.g.*, NRS 449.170 (dealing with the imposition of sanctions for discovery violations). If the petitioners have for whatever reason failed to locate the authority this Court deems most pertinent, they should not be penalized for the failure, since the trial judge gave them no guidance on the legal foundation for his sanctioning power.

generally Watson Rounds, 358 P.3d at 230 (explaining that NRS 7.085 and NRCP 11 are "distinct, independent mechanism[s] for sanctioning attorney misconduct").

As a consequence of the vacuum, it is impossible for the petitioners to effectively challenge the district court's analysis, because there is no analysis to speak of. Did the district court find that the petitioners maintained an action that was "not warranted by existing law or by an argument for changing the existing law that is made in good faith?" NRS 7.085(1)(a). Did it find that they "[u]nreasonably and vexatiously extended a civil action or proceeding"? NRS 7.085(1)(b). Did it find that they presented an argument "to harass or to cause unnecessary delay or needless increase in the cost of litigation"? NRCP 11(b)(1). There is no way to know the answer to any of these rather straightforward questions, because the district court did not say. The petitioners cannot reasonably be expected to defend themselves against accusations that are hidden from them.[9]

[9] The district court did not suggest in its order that the supposedly sanctionable conduct created any delay. *See* App. 528–29. In any event, it did not. The motion to amend was filed because *the State* refused to litigate the amended petition, as it routinely does in the overwhelming majority of similarly situated cases. *See* App. 209–10, 227. It was therefore the State that caused any delay associated with the motion to amend, which was at any rate minimal. And the mere inclusion in the Reply of reasonable-doubt arguments could not have measurably prolonged the lifespan of the case. It was one argument among many, and even with its presence the Court promptly disposed of the petition. *See* App. 508–38 (resolving the petition approximately seven months after it was filed).

Notably, the absence of authority also serves as an unfair handicap to the petitioners in asserting any kind of global challenge to the basis for the sanctions. For instance, this Court has declared that "habeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes. It is a special statutory remedy which is essentially unique." *Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980). There is a bona fide question, then, as to whether civil sanction rules apply to Mr. Howard's post-conviction case at all. *See Young*, 107 Nev. at 647, 818 P.2d at 847 (reserving the question of whether NRCP 11 applies to criminal cases); *United States ex rel. Potts v. Chrans*, 700 F. Supp. 1505, 1524 (N.D. Ill. 1988) (reminding that Fed. R. Civ. P. 11, which parallels NRCP 11, has no bearing in criminal cases because it "may chill creative advocacy and impede the development of the law" and is therefore "inappropriate in the criminal context"). Again, though, the petitioners cannot raise that question, as they have no idea what rules the district court relied upon for its sanctioning authority, if it relied upon any.

Because the failure to cite any sanction authority whatsoever strips the petitioners of any meaningful ability to contest the sanctions, the omission compels reversal standing alone. *See Sakon v. Andreo*, 119 F.3d 109, 113 (2d Cir. 1997) (reiterating that a sanctions award made "without reference to any statute, rule,

decision, or other authority, or with reference only to a source that is inapplicable will rarely be upheld").

As with its failure to justify the sanctions themselves, the district court failed to even attempt to explain how it arrived at the amount of $250 for attorney fees. Unless the number was derived from an unreported ex parte contact with the prosecutor, which would of course be highly improper, it was selected at random in an act of guesswork. That too is unlawful. *See Beattie v. Thomas*, 99 Nev. 579, 588–89, 668 P.2d 268, 274 (1983) (listing the factors that must be evaluated by the district court before it arrives at an amount to award for attorney fees).

It is impossible to exercise meaningful appellate review of an order that offers no relevant explanation, completely fails to respond to legitimate arguments to the contrary, and cites no relevant authority for its action. In the absence of those crucial parts of any valid ruling, the order cannot be affirmed and the sanctions must be vacated. *See Gitter*, 393 P.3d at 682 ("In the context of an attorney fees award, this court has previously held that 'a district court abuses its discretion by making such an award without including in its order sufficient reasoning and findings in support of its ultimate determination.'" (quoting *Watson Rounds*, 358 P.3d at 233)); *Houston v. Eighth Jud. Dist. Ct.*, 122 Nev. 544, 553–55, 135 P.3d 1269, 1274–76 (2006) (en banc) (per curiam) (granting a mandamus petition because the district court failed to sufficiently explain why sanctions were

imposed). Because the requirement that district courts cite some authority for the sanction decisions is purely legal, this error should be reviewed and corrected here under a de novo standard. *See Gunderson*, 319 P.3d at 616.

Interestingly, Judge Villani wrote in his order that he was imposing sanctions because it was the court's "intention to follow the procedural rules." App. 529. On top of the fact that the petitioners did not violate any procedural rules, *see supra* at 16–25, it is remarkable that the district court would make such a statement while electing not to cite any rule whatsoever under which it was imposing sanctions, not to follow the process set forth in any of the rules, *see infra* at 40–49, and not to make any of the findings required by any of the rules.

In *Young*, this Court conveyed to Nevada trial judges—more than twenty-five years ago—that they were to bring enhanced "circumspection in the imposition of [attorney] sanctions in death cases." 107 Nev. at 650, 818 P.2d at 849. Completely ignoring that instruction, the district court brought *less* circumspection to the sanctioning of the petitioners than a typical trial judge would have brought to the sanctioning of attorneys in a minor civil matter. It brought so little circumspection as to avoid even mentioning the authority that it regarded as allowing it to sanction the petitioners. That is not nearly the level of prudence and caution the *Young* Court mandated, and it certainly fails the "heightened appellate concern and scrutiny," *id.*, applied here.

Such an opaque sanctions award, rendered to punish attorneys for good-faith representation of a capital client, can be vacated without need for further proceedings. That said, the near total omission of these elements compels—at the very least—a remand with instructions for the district court to reexamine whether sanctions are called for and, if they are, why they are being imposed and on what authority.

C. The Petitioners Were Deprived Of Notice And A Chance To Be Heard

Aside from failing to satisfactorily explicate its sanctions decision, the district court also failed to provide the petitioners any notice and an opportunity to be heard on the issue before it fined them, abdicating its most elementary due process responsibilities.

The district court first brought up sanctions in its journal entry, where it wrote: "It is FURTHER ORDERED that sanctions are imposed against Petitioner's counsel for attorney fees in the amount of $250.00 in which the State incurred for having to respond to Petitioner's additional Motion to Amend after this Court denied such on March 17, 2017 and prior leave was not obtained." App. 475–76. At the conclusion of the entry, the court instructed the State to submit a proposed order. App. 477. The State did so and the court signed it without making any changes. *Compare* App. 478–507, *with* App. 508–38. At no point did the court solicit the petitioners' input on the matter. By the time the petitioners learned of

the sanctions, in the journal entry, it was in the form of an "order," and therefore a fait accompli.

When it fined the petitioners without offering them any say on the question, the district court transgressed a universal and longstanding principle of law. It is a principle protected first and foremost by the U.S. Constitution, which provides that no person can be deprived of "life, liberty, or property, without due process of law." U.S. Const., Am. V; U.S. Const. Am. XIV. A cornerstone of due process is notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (internal quotation marks omitted)). When the district court here ordered the petitioners to pay $250 without any such notice or hearing, it deprived them of their property without affording them any process whatsoever, violating the Fifth and Fourteenth Amendments in about as patent a fashion as one could imagine.

In contrast with the trial judge's approach, numerous courts have concluded that the due process clauses of the federal constitution requires a judge to afford attorneys notice and an opportunity to be heard before they are saddled with a monetary sanction. *See, e.g.*, *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2464 (1980) ("Like other sanctions, attorney's fees certainly should

not be assessed lightly or without fair notice and an opportunity for a hearing on the record."); *Anjelino v. New York Times Co.*, 200 F.3d 73, 100 (3d Cir. 1999) ("[I]t is settled law that an attorney must have notice and an opportunity to be heard on the possibility of being sanctioned, consistent with the mandates of the due process clause of the Constitution."); *Satcorp Int'l Grp. v. Silk Import & Export Corp.*, 101 F.3d 3, 6 (2d Cir. 1996); *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 42 (4th Cir. 1995); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 523 (9th Cir. 1983).[10]

Nevada's due process clause is nearly identical to the language in the Fifth and Fourteenth Amendments to the U.S. Constitution. *See Reinkemeyer v. Safeco Ins. Co.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001) (en banc) (per curiam) (discussing Nev. Const. art. 1, § 8(5)). As a result, the clause should be interpreted consistently with the federal decisions. *See id.*[11] By unilaterally imposing

[10] Although there are multiple bases for sanctions in federal court, notice and an opportunity to be heard must be supplied before they are imposed under *any* authority. *See Johnson v. Cherry*, 422 F.3d 540, 551 (7th Cir. 2005) ("[B]efore a court may impose sanctions *sua sponte*, it must give the offending party notice of its intent to do so and the opportunity to be heard. This is true whether the court is sanctioning a party pursuant to its authority under Rule 11, section 1927, or its inherent authority.").

[11] If the Court determines that the federal constitution does not guarantee attorneys a right to notice and an opportunity to be heard before they are sanctioned, the petitioners still maintain that the state constitution enshrines that right. *See Mills v. Rogers*, 457 U.S. 291, 300, 102 S. Ct. 2442, 2448–49 (1982) ("Within our federal

sanctions on the petitioners without hearing their side of the story, the district court stepped well over these rudimentary constitutional lines.

It transgressed basic tenets of state law at the same time. As in the federal courts, *any* type of sanction—no matter what authority it is imposed under—must be preceded by notice and an opportunity to be heard. Even though the district court did not supply any authority for its sanction order, the due process requirements remain the same across the board.

In regards to EDCR 7.60, that is obvious from the face of the rule itself, which provides that a "court may, *after notice and an opportunity to be heard*, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees" under various listed circumstances. (Emphasis added.) For its part, NRCP 11 permits sanctions either upon one party's motion—which by definition gives the other side a chance to respond, *see* NRCP 11(c)(1)(A)—or sua sponte *following the issuance of a show-cause order*, *see* NRCP 11(c)(1)(B), which has the same effect, *see Heal v. Heal*, 762 A.2d 463, 469 (R.I. 2000) (recognizing

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system the substantive rights provided by the Federal Constitution define only a minimum.").

that a show-cause order can provide notice and an opportunity to be heard in the attorney-sanctions context).[12]

As for NRS 7.085, this Court has acknowledged that it is the state-law equivalent of 28 U.S.C. § 1927, and has consulted federal decisions in construing the statute. *See Watson Rounds*, 358 P.3d at 232. In federal court, it is universally understood that § 1927 sanctions must be preceded by notice and an opportunity to be heard. *See Gollomp v. Spitzer*, 568 F.3d 355, 368 (2d Cir. 2009); *Clark v. UPS*, 460 F.3d 1004, 1011 (8th Cir. 2006); *Johnson*, 422 F.3d at 551.

In sum, notice and an opportunity to be heard prior to the imposition of sanctions are "basic principles of due process," *Wilson v. Citigroup, N.A.*, 702 F.3d 720, 725 (2d Cir. 2012), that are mandatory under the state and federal constitutions, as well as under any of the relevant statutes or rules. The district

[12] NRS 18.010 also allows courts to order the payment of attorney fees. It appears the provision has never before been cited in a reported post-conviction case, strongly suggesting that it does not apply here. Further militating in favor of the same conclusion, NRS 18.010(2)(b) refers to the award of "attorney's fees pursuant to this paragraph" and to the imposition of "sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure." The district court characterized its fine as a "sanction," *see* App. 529, indicating that it does not fall under NRS 18.010. Finally, NRS 18.010 only applies where "the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). The district court sanctioned the petitioners for making a particular *argument*, and potentially for filing a motion to amend. Neither action falls within the categories enumerated by NRS 18.010(2)(b), and the statute does not apply here.

court overlooked that basic principle and ordered the sanctions here without inviting any comment from the petitioners in advance. In so doing, it abused its discretion, and its sanction order cannot stand. It is important to remember on that subject that the question of whether notice and an opportunity to be heard are obligatory before sanctions can be imposed is a purely legal question to which de novo review attaches. *See Gunderson*, 319 P.3d at 616. Exercising that independent consideration, vacatur of the sanctions is proper.

Again, the total deprivation of notice and an opportunity to be heard prior to the imposition of sanctions does not reflect the increased "circumspection" required by this Court "in the imposition of [attorney] sanctions in death cases." *Young*, 107 Nev. at 650, 818 P.2d at 849. It is less circumspection than would be afforded an attorney representing a shoplifter, who—like all attorneys—is entitled to such notice.

As clarified above, the sanctions should be dissolved without any further proceedings, since the petitioners plainly did not engage in any sanctionable conduct. With that in mind, the district court's failure to provide any notice or an opportunity to be heard are simply symptomatic of the general and glaring deficiencies in its sanctions order, which include the other flaws described here. Those flaws collectively cut in favor of a decision vacating the sanctions and ending the matter. In the alternative, the failure to provide notice and an

opportunity to be heard at the very least demands a remand for further proceedings before a different judge, *see infra* at 49–50.

D. It Was Improper To Order The Sanctions Paid To The District Attorney's Office

Yet another signal of the sanctions' impropriety comes in the form of the fact that they were ordered paid to the District Attorney's Office. *See* App. 529.

As an initial matter, it is never appropriate for a court to order public defenders to pay money directly to a prosecutor's office for perceived misconduct. It is a far better practice for sanctions to be paid to the court. *See Young*, 107 Nev. at 650, 818 P.2d at 849 (upholding a district court's decision to sanction a public defender with a fine payable to the clerk of court); *cf.* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 477 (2017) (criticizing the use of forefeiture laws because they give prosecutors financial incentives to pursue cases more aggressively).

The district court's contrary approach creates a problematic financial incentive for prosecutors to accuse their opponents of engaging in unethical behavior when they are simply attempting to obey their professional responsibilities and provide zealous representation. The case at bar offers a telling example. In his pleadings below, the prosecutor assigned to the proceeding repeatedly and baselessly charged the petitioners with misconduct, which he began doing as soon as the matter was opened and continued to do in nearly every

document he filed. *See supra* at 4–5. These allegations were based on nothing other than the prosecutor's openly and repeatedly expressed hostility to all capital defense attorneys and on the fact that other death row inmates happened to be also pursuing relief under a landmark new Supreme Court decision. *See* App. 151 n.9 (accusing *all* Federal Defender organizations of having "an almost religiously militant opposition to the death penalty" while citing a series of irrelevant authorities having nothing to do with the Federal Defender Services of Idaho, the only public defense organization involved in this case); App. 197 (same); App. 460 (same).

If indigent defense organizations have to pay such prosecutors directly, assistant district attorneys who follow the approach taken by Mr. VanBoskerck here will become even more overheated and unrestrained in their polemics against public defense as an institution. Eventually, the public's trust in government prosecutors as forces for justice—and their trust in the judicial system as a whole—will suffer. *See Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935) (reminding that the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Even if one allowed that in some situations judges could order attorney fees payable by public defenders to prosecutors, the current situation would not be one. NRCP 11(c)(2) informs district courts that sanction orders "may consist of, or

include, directives of a nonmonetary nature, an order to pay a penalty into court, or, *if imposed on motion* and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." (Emphasis added.) As the emphasized text demonstrates, attorney's fees can only be ordered paid if one of the litigant requests them. The district court here explicitly directed the petitioners to pay "attorney fees," App. 529, and did so even though the district attorney had not moved for them. Its ruling flatly contradicted NRCP 11(c)(2) and cannot stand.

In the same vein, "[i]t is well established in Nevada that attorney's fees are not recoverable unless allowed by express or implied agreement or when authorized by statute or rule." *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (en banc) (internal quotation marks omitted). The *Miller* Court made plain that the rule is to be construed narrowly. It went so far as to say that a case providing for attorney fees in a paternity dispute did not apply to a divorce matter. *Id.*, 121 Nev. at 624, 119 P.3d at 730. To the petitioners' knowledge, there is no statute or rule allowing attorney's fees in capital post-conviction cases. It was accordingly improper for the district court to order them.

As before, this error is just one of many, and collectively the numerous deficiencies in the sanctions order militate in favor of a straightforward vacatur,

rather than a remand. Failing that, it is necessary to send the case back down so that the district court can follow a procedure that is—unlike the procedure it followed before—consistent with the rules.

E. If Remanded, The Case Should Be Reassigned To A New Judge

The petitioners have stressed above their view that no further proceedings are needed, as the sanctions are so egregiously unwarranted that they should simply be summarily vacated by this Court. *See supra* at 37–38, 45, 48–49. Assuming for the sake of argument that the Court feels differently and orders a remand, any further proceedings should take place before a new judge.

Reassignment is advisable when it will "avoid any appearance of impropriety." *Fisher v. Fisher*, 99 Nev. 762, 765, 670 P.2d 572, 574 (1983) (per curiam). Such an appearance would be present here. Judge Villani sua sponte fined the petitioners without providing them any notice or opportunity to be heard, citing no authority for the decision, and ordering them to pay the money directly to the District Attorney's Office, all in the interest of punishing them for their good-faith efforts to thoroughly represent the constitutional interests of their death-sentenced client—who they were all serving without compensation, two of them as public defenders and one pro bono.

Under the circumstances of this case, a reasonable observer would question Judge Villani's ability to impartially adjudicate the sanctions matter on remand,

and reassignment is appropriate. In fact, given Judge Villani's handling of the sanctions, it would violate the petitioners' due process rights to force them to appear before him again on the same issue. *See Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (reversing this Court and explaining that due process is violated when a judge's circumstances reflect "an unconstitutional potential for bias" (internal quotation marks omitted)).

VI. CONCLUSION

In this case, the district court used sanctions to punish the petitioners for reasonable and zealous advocacy on behalf of a client under sentence of death, rendered in good faith. The judge did so without citing any authority for its ruling and while ordering the petitioners to pay the money directly to the District Attorney's Office. Because such an order represents a blatant abuse of discretion, the petition for mandamus should be granted and the sanctions vacated. In the alternative, the Court should grant the petition and remand the case so that the district court—acting through a different, unbiased judge—can reconsider the propriety of the sanctions and follow the governing rules that it overlooked before.

DATED this 13th day of July 2017.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

/s/ Paola M. Armeni

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SERVICES OF IDAHO

/s/ Jonah Horwitz

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/s/ Deborah A. Czuba

DEBORAH A. CZUBA, ESQ.
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VERIFICATION

I, JONAH J. HORWITZ, ESQ., declare as follows:

1. I am the one of the petitioners in the above captioned matter.

2. I verify that I have read the foregoing Petition for Writ of Mandamus or Prohibition and that the same is true to my own knowledge, except those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under the penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

This declaration is executed on the 13th day of July, 2017 in Boise, Idaho.

/s/ Jonah J. Horwitz
JONAH J. HORWITZ, ESQ.

CERTIFICATE OF COMPLIANCE

We hereby certify that this petition 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 the petition has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. The petition is 13,164 words, which is under the limits set for opening briefs by NRAP 32(a)(7)(A)(ii) and NRAP 32(a)(7)(B)(ii), in the event either rule applies to the petition. We further certify that we have read this petition and that it complies with NRAP 21.

Finally, we hereby certify that to the best of our knowledge, information and belief, the petition is not frivolous or interposed for any improper purpose. We further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion regarding matters in the record be supported by appropriate references to the record. We understand that we may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of July 2017.

/s/ Paola M. Armeni
PAOLA M. ARMENI, ESQ.

/s/ Jonah J. Horwitz
JONAH J. HORWITZ, ESQ.

/s/ Deborah A. Czuba
DEBORAH A. CZUBA, ESQ.

Exhibit 1

(Declaration of Jonah J. Horwitz)

DECLARATION IN SUPPORT OF MANDAMUS PETITION

Jonah J. Horwitz declares as follows under the penalty of perjury under the law of the State of Nevada that the following is true and correct:

1. In his state post-conviction case, I am counsel for Petitioner Samuel Howard, along with Deborah Anne Czuba and Paola M. Armeni. I and Ms. Czuba have primary responsibility for litigating this case on behalf of Mr. Howard. Ms. Armeni is assisting us as local counsel.
2. Ms. Czuba and I both work for the Capital Habeas Unit for the Federal Defender Services of Idaho. The Capital Habeas Unit exclusively represents indigent state inmates under sentence of death. Ms. Armeni works for a private firm and is assisting us pro bono as local counsel in the representation of Mr. Howard.
3. On October 5, 2016, we filed a petition for post-conviction relief. It contained a single claim, alleging that this Court violated Mr. Howard's constitutional rights under *Hurst v. Florida*, 136 S. Ct. 616 (2016), when it reweighed the mitigation against the aggravation in its 2014 decision and upheld his death sentence. The State submitted an opposition and motion to dismiss on November 2, 2016.
4. While preparing our combined reply in support of the petition and response to the motion to dismiss, I began drafting arguments based on the reasonable-doubt standard. Specifically, I included in the draft reply passages contending that this Court did not follow the reasonable-doubt standard in its reweighing, as required by *Hurst*, and that *Hurst* was retroactive because it had a reasonable-doubt component. Both arguments were written to bolster the appellate-reweighing claim. It was partly by drafting those arguments that I became aware of Claim Two, which alleged that the jury's weighing of aggravation and mitigation at sentencing also violated *Hurst* because it too was not conducted under the reasonable-doubt test.
5. On May 15, 2017, the district court issued its final order in the post-conviction case, imposing sanctions on me, Ms. Czuba, and Ms. Armeni. From that day until June 4,

2017, Ms. Czuba and I were preparing for an evidentiary hearing in *Row v. Miller*, No. 1:98-cv-240. The evidentiary hearing began on June 5, 2017 and concluded on June 9, 2017. It was a complex proceeding involving a claim of ineffective assistance of counsel for failure to present evidence of brain damage at a capital sentencing.

6. After the hearing ended, I worked steadily on the petition for mandamus and devoted a substantial amount of time to completing it. During the same period, I have also been working on the opening brief in *Howard v. Filson*, Nev. S. Ct. No. 73223, evidence-preservation issues in *Abdullah v. Ramirez*, D. Idaho, No. 1:17-cv-098, and various additional investigative and legal tasks in the other capital cases our office has been appointed to.

7. The mandamus petition is being filed as soon as it is finalized, without any attempt to delay.

DATED this 13th day of July 2017.

/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (*pro hac vice)*
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing mandamus petition on July 13, 2017. I have also emailed or mailed the mandamus petition and the accompanying appendix by Federal Express, postage prepaid, for delivery within three calendar days to the following people:

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In addition, I am filing in the underlying case, Clark County number 81C053867, a notice regarding the submission of the foregoing mandamus petition.

/s/ Joy Fish
Joy Fish, Paralegal
Federal Defender Services of Idaho