

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
COUNTY OF CLARK, STATE OF
NEVADA, THE HONORABLE MICHAEL
P. VILLANI, DISTRICT COURT JUDGE,

Respondents,

And

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

Real Party in Interest.

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CASE NO: 73462

D.C. NO: 81C053867

OPPOSITION TO MOTION TO CONSOLIDATE

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COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and submits this Opposition to Motion to Consolidate pursuant to Rule 27(e) of the Nevada Rules of Appellate Procedure (NRAP). This opposition is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 18th day of July, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Jonathan E. VanBoskerck
JONATHAN E. VANBOSKERCK
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MEMORANDUM OF POINTS AND AUTHORITIES¹

Petitioners' request for consolidation is premature. This Court has yet to even determine whether to order an answer. Regardless, the judge below acted within his authority to enforce basic rules of Nevada Procedure against a federal agency that repeatedly ignored those rules.

This "court may deny the petition without an answer." NRAP 21(b)(1). This is exactly what should happen in this matter because the lower court acted within its discretion. Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe

¹ Petitioners filed a similar motion in the appeal of the denial of habeas relief in Howard v. State, Nevada Supreme Court Case Number 73223. Since the motions are substantially similar Respondent's oppositions under both case numbers will be nearly identical.

County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will only issue to control a court's arbitrary or capricious exercise of its discretion." Id. citing Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-1016 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

Manifest abuse or arbitrary and capricious exercise of authority is an exceedingly high bar that requires far more than the mere displeasure of an attorney or litigant with an adverse ruling. Instead:

An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than one reason," Black's Law Dictionary, 119 (9th ed. 2009) (defining "arbitrary"), or "contrary to the evidence or established rules of law," id. at 239 (defining "capricious"). See generally, City Council v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 372 (1986) (concluding that "[a] city board acts arbitrarily and capriciously when it denies a license without any reason for doing so"). A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." Steward v. McDonald, 330 Ark. 837, 953 S.W.2d 297, 300 (1997); see Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628, 66 S.W.3d 599, 602 (2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due consideration"); Blair v. Zoning Hearing Bd. of Tp. Pike, 676 A.2d 760, 761 (Pa.Comm.w.Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

State v. Eighth Judicial District Court (Armstrong), 127 Nev. ___, 267 P.3d 777, 780 (2011).

The imposition of sanctions is only reviewed for an abuse of discretion. Public Employees' Ret. Sys. v. Gitter, 133 Nev. ___, ___, 393 P.3d 673, 682 (Nev. 2017). Importantly, this Court has recently spoken out against gamesmanship on the part of defense attorneys in capital cases. Righetti v. Eighth Judicial District Court, 133 Nev. ___, 2017 Nev. LEXIS 12 (Nev. 2017). Indeed, this Court has made it clear that the judicial process should be free from misconduct regardless of the source. Williams v. State, 103 Nev. 106, 111, 734 P.2d 700, 704 (1987).

The sanction must be placed in the context of the misbehavior below. The fifth round of state habeas litigation began with gamesmanship from Petitioners. As the State pointed out:

The FPD has engaged in a pattern of waiting until just before the one-year deadline of NRS 34.726(1) to file Hurst claims in eighteen (18) cases before the Eighth Judicial District Court and the Nevada Supreme Court. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed

December 1, 2016; McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017).

The above listed 18 pleadings were filed by four different branch offices of the FPD. The Nevada FPD filed fourteen of them. (Adams, Larry (C069704), Fifth Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), filed January 10, 2017; Byford, Robert (C108502), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Castillo, William (C133336), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Crump, Thomas (83C064243), Petition for Writ of Habeas Corpus Post-Conviction), filed January 6, 2017; Doyle, Antonio (C120438), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Echavarria, Jose (C095399), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Greene, Travers (C124806), Petition for Writ of Habeas Corpus Post-Conviction), filed January 10, 2017; Hernandez, Fernando (C162952), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Powell, Kitrich (90C092400), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Rippo, Michael (C106784), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Sherman, Donald (C126969), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Smith, Joe (C100991), Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Walker, James (03C196420-1), Supplement to Petition for Writ of Habeas Corpus Post-Conviction), filed January 9, 2017; Witter, William (C117513), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017). The FPD Central Division of California office filed two. (Emil, Rodney (C082176), Petition for Writ of Habeas Corpus Post-Conviction), filed January 11, 2017; Guy, Curtis (65062), Notice of Supplemental Authorities, filed January 11,

2017). The Arizona branch office filed one. (McKenna, Patrick (C044366), Supplement to Petition for Writ of Habeas Corpus, filed January 11, 2017). And, the Idaho FPD filed one in this case. (Howard, Samuel (81C053867), Amended Petition for Writ of Habeas Corpus, filed December 1, 2016).

2 AA 460-62.

Moreover, petitioners' skullduggery continued after filing the fifth state habeas petition on October 5, 2016. (3 Appellant's Appendix (AA) 526).² The State filed an opposition and motion to dismiss on November 2, 2016. Id. On December 1, 2016, Petitioners filed an amended petition. 3 AA 527. The State sought dismissal of the additional claim because Petitioners filed the amended petition without securing prior permission in violation of NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). 1 AA 195-202. The lower court struck the amended fifth petition on that basis on March 17, 2017. 3 AA 527. Petitioners next sought reconsideration of the decision to strike the amended fifth petition without seeking leave of court to do so. Id. On May 2, 2017, the lower court issued a minute order "imposing a \$250.00 sanction upon Howard's counsel for causing the State to respond to the Motion to Amend when the Court had already decided the issue in the context of striking the Amended Fifth Petitioner and/or failing to seek leave of court prior to requesting consideration." Id.

² Petitioners have titled their appendix Appellant's Appendix even though this is a writ proceeding. The State will refer to Petitioners' appendix as Appellant's Appendix in order to avoid confusion.

Petitioners' started this process through the gamesmanship of waiting until the eve of the one-year time bar of NRS 34.726 kicking in. Petitioners next ignored the plain text of NRS 34.750(5) by failing to seek leave of court to file an amended petition. Petitioners then ignored the plain text of both Rule 13(7) of the District Court Rules of Nevada (DCR) and Rule 7.12 of the Eighth Judicial District Court Rules (EDCR).

The judge below had every right to hold petitioners accountable for playing games and repeatedly ignoring the most basic of procedural rules. Petitioners should have been on notice to comply with the requirements of DCR 13(7) and EDCR 7.12 to seek leave prior to demanding reconsideration. This notice came in the form of having their pleading struck for failing to seek leave to file an amended habeas petition as required by NRS 34.750(5). Petitioners essentially committed the same offense again by demanding reconsideration without first seeking leave to do so. The lower court had tried to make the message clear with a lesser sanction of striking a pleading and was left with little choice but to hold petitioners accountable when they again ignored their responsibility to seek leave of court. The judge below had the inherent authority to enforce basic rules of procedure. See, NRS 1.210(3); Jordan v. State ex rel. DMV & Public Safety, 121 Nev. 44, 58-59, 110 P.3d 30, 41-42 (Nev. 2005), overruled in part on other grounds, Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008).

CONCLUSION

This Court has warned that rules exist for a reason and that violating them comes with a price:

In the words of Justice Cardozo,

Every system of laws has within it artificial devices which are deemed to promote ... forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.

Benjamin N. Cardozo, *The Paradoxes of Legal Science* 68 (1928). The district court should have upheld the requirements mandated in *Hill* and therefore should have dismissed the case against Scott.

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

Based on the foregoing arguments as set forth above, the State respectfully requests that this Court deny Petitioner's Motion to Consolidate.

Dated this 18th day of July, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Jonathan E. VanBoskerck

JONATHAN E. VANBOSKERCK
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 18, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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

JEV//ed