IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 73462

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

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.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF PURSUANT TO NRAP 29 AND FOR LEAVE TO FILE LATE BRIEF

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Pursuant to Rule 29(c) of the Nevada Rules of Appellate Procedure (NRAP), the Ethics Bureau at Yale, as *amicus curiae*, respectfully requests leave of this Court to file the accompanying Brief of Amicus Curiae in support of the Petition for Writ of Mandamus on behalf of Paola M. Armeni, Jonah J. Horwitz, and Deborah A. Czuba, who seek relief from being sanctioned for ethical conduct in

zealously representing their client in a capital habeas proceeding. Pursuant to Rule 29(f) of NRAP, we request that the Court exercise its discretion to grant leave to file a brief outside of the normal filing period.

INTRODUCTION

The Ethics Bureau at Yale ("EBaY") is a student clinic of the Yale Law School composed of twelve students and supervised by an experienced practicing lawyer, lecturer, and ethics professor. EBaY drafts amicus briefs in matters involving lawyer and judicial professional responsibility, aids defense counsel in ineffective assistance of counsel claims that implicate professional responsibility issues, and provides assistance and counseling on a pro bono basis to non-profit legal service providers, courts, and law schools.

Lawrence J. Fox is a partner at Schoeman Updike Kaufman & Gerber LLP and Visiting Lecturer of Law and the Crawford Lecturer at Yale Law School, where he teaches Ethics and Professional Responsibility. He has authored numerous articles and books on Professional Responsibility, is the former Chair of the ABA Standing Committee on Ethics and Professional Responsibility, and has served as an advisor to the *Restatement (Third) of the Law Governing Lawyers*.

Amicus understands that this brief is filed after the typical seven-day deadline under NRAP 29(f). Counsel for Petitioners consents to the filing of the accompanying brief, but counsel for Respondents does not.

Amicus requests that the Court exercise its discretion to grant leave to file past the deadline. Considering the significant interest that *amicus* has in the issues presented by this case and its good faith efforts to comply with the seven-day deadline, *amicus* respectfully requests that the Court grant this motion.

ARGUMENT

I. THIS AMICUS BRIEF IS DESIRABLE.

Amicus has a significant interest in maintaining the professional obligations of counsel who represent convicted individuals on death row as well as the ethical obligations of judges who impose sanctions. As a clinic devoted to professional ethics, *amicus* believes that it can aid the Court by providing a thorough analysis of the applicable American Bar Association and Nevada Rules of Professional Conduct. In short, while we do not take a position on the merits of Mr. Howard's habeas petition, we do take a position on the professional conduct required of the attorneys and judge involved in this case.

As set forth more fully in its brief, *amicus* believes that the Court's review of Petitioners' petition for writ of mandamus will be significantly aided by a more detailed discussion of the important ethical implications raised by the trial court's decision to sanction Petitioners for preserving their death-row client's constitutional claims. This brief details the reasons why this Court should vacate the sanctions imposed on Petitioners—including the harmful effects of the District

Court Judge's actions on the state's pro bono advocacy—in order to uphold the standards of the legal profession in Nevada.

II. THE COURT SHOULD GRANT LEAVE TO FILE LATE.

Amicus understands that this brief in support of the petition for mandamus is filed past the typical seven-day deadline, as Petitioners filed their petition on July 14, 2017 (Nevada Supreme Court Case No. 73462). However, there is nothing in the Nevada Rules of Appellate Procedure to suggest that the seven-day deadline applies to amicus briefs filed in support of writ petitions rather than in support of appellate briefs. See NRAP 29(f) (specifying that the amicus brief deadline is measured from the filing date of "*the brief* of the party being supported" or, in the case of a brief supporting neither party, from the filing date of the "appellant's opening *brief*") (emphasis added). Moreover, this Court has indicated that the deadlines that govern mandamus petitions are distinct from deadlines for other forms of relief. *See State v. Eighth Judicial Dist. Ct.*, 118 Nev. 140, 147-48, 42 P.3d 233, 238 (2002) (explaining that writ relief is subject to laches). In any case, under NRAP 29(f), "[t]he court may grant leave for later filing, specifying the time within which an opposing party may answer."

Given the circumstances described in this paragraph that prevented *amicus* from filing a timely brief and its good faith efforts to comply with the deadlines, *amicus* respectfully requests that the Court exercise its discretion to grant leave for

later filing. Petitioners filed their opening brief on October 11, 2017 (Nevada Supreme Court Case No. 73223). When this matter came to its attention, *amicus* believed in good faith that it would be filing an *amicus* brief in support of Petitioners' opening brief, which would be consolidated with the mandamus petition. *Amicus* was therefore aiming to meet the timely filing deadline of October 18, 2017. At the time of the drafting of this brief, the motion to consolidate was still pending before this Court. *See* Order Den. Mot. To Consolidate (filed Oct. 12, 2017).

Since Petitioners' motion to consolidate was denied and *amicus'* brief deals primarily with the issue of sanctions raised in the mandamus petition, the October deadline is no longer applicable. However, given the ethical significance of the District Judge's decision to sanction defense counsel in this case, *amicus* felt compelled to do its best to support Petitioners in this matter. Moreover, given that Respondents have not filed—nor have they been ordered by the Court to file—an answer to the writ of mandamus, they have not missed the opportunity to take into consideration and respond to *amicus*' arguments.

Given its abiding interest in this case and good faith efforts to comply with the Court's procedural deadlines, *amicus* respectfully requests permission to file.

Dated: October 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this motion was filed electronically with the Nevada Supreme Court on the 18th day of October, 2017. I have also emailed or mailed the Amicus Brief within three calendar days to the following people:

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Respondents.

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BRIEF OF THE ETHICS BUREAU AT YALE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. There are no parent corporations or any publicly held company that owns 10% or more, or any portion of the Ethics Bureau at Yale.
2. William H. Brown of Lambrose Brown PLLC and Joseph Z. Gersten of The Gersten Law Firm PLLC are the only lawyers and firms who have appeared for Amicus Curiae in this case.

Dated: October 18, 2017

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS*

The Ethics Bureau at Yale ("EBaY") is a clinic composed of twelve law students supervised by an experienced practicing lawyer and lecturer in legal ethics, Lawrence J. Fox.[1] Mr. Fox is currently the George W. and Sadella D. Crawford Visiting Lecturer of Law at Yale Law School, teaching ethics and professional responsibility, and serves as the supervising lawyer for the Clinic. He was formerly a lecturer in law at both Harvard Law School and the University of Pennsylvania Law School, and has authored many articles and books on professional responsibility. He is the former Chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility and has served as an advisor for the *Restatement (Third) of the Law Governing Lawyers*.

EBaY submits amicus briefs in matters involving lawyer and judicial conduct and ethics to various adjudicative bodies; assists defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and provides assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

[1] The preparation and publication of this document by the Ethics Bureau at Yale, a clinic affiliated with Yale Law School, does not reflect any institutional views of Yale Law School or Yale University. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* has made a monetary contribution to the preparation and submission of this brief.

Amicus seeks to assist this Court in determining the professional obligations of counsel for a convicted individual on death row in a habeas corpus proceeding as well as the ethical obligations of a judge imposing sanctions. Specifically, *amicus* believes that zealous advocacy is among the most foundational duties that lawyers owe to their clients and is critical to safeguarding public trust in the criminal justice system. As such, *amicus* has an abiding interest in ensuring that capital defendants benefit from zealous advocacy and that the courts enforce the standards established by the Nevada Rules of Professional Conduct and the Nevada Code of Judicial Conduct on these topics. *Amicus* hopes that its perspective will assist the Court in addressing the important ethical issues presented by this case.

Amicus has submitted a motion seeking leave of the court to file this brief pursuant to NRAP 29(a).

STATEMENT OF FACTS AND PROCEDURE

Petitioners are public defenders in the Capital Habeas Unit of the Federal Defender Service of Idaho as well as a private attorney, duly admitted in Nevada, assisting with this case pro bono. These lawyers represent Samuel Howard, a capital defendant, in post-conviction habeas proceedings. *See* Pet. for Mandamus at 3. After the Supreme Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), counsel filed a petition alleging certain constitutional violations in Mr. Howard's previous post-conviction appeal. In particular, *Hurst* emphasized the need for

juries, not judges, to weigh the aggravating factors that support a death sentence against the mitigating factors that cut against one. *Id.* at 624. Because this Court nullified an aggravating factor and then reweighed the remaining aggravating factors against the mitigation, Petitioners alleged a *Hurst* violation.

Shortly thereafter, Petitioners filed an amended petition and added an additional *Hurst* claim based on the jury instructions given at Mr. Howard's original sentencing. Consistent with local practice, counsel did not file for leave to amend the original petition. Pet. for Mandamus at 5. The State then filed a motion to strike this amended petition and argued that defense counsel was required to pursue leave to file in advance of filing the amended petition. *Id.* at 6. The District Court held a hearing and struck the amended petition. *Id.* at 7. Assuming that the striking was due to their failure to file for leave, Petitioners responded by filing for leave to amend to add the additional *Hurst* claim. *Id.* Once again, the State opposed the motion to amend, arguing that the motion was akin to a motion for reconsideration of the court's order striking the amended petition and that Petitioners must first seek leave to file a motion for leave to amend. *Id.* at 8.

The District Court denied leave to amend and *sua sponte* sanctioned Petitioners with a $250 fine, payable to the Clark County District Attorney's Office. Although the basis for the fine was somewhat unclear, it appears from the court's final order that the sanction was imposed because of the Court's

dissatisfaction with Petitioners for seeking leave to amend and for discussing the issue of resonable doubt in their reply. *Id.* at 10. Petitioners first found out about the sanctions when the sanctions were ordered in the journal entry; Petitioners were never given an opportunity to contest the sanctions. *Id*. at 41. *Amicus* joins Petitioners in urging this Court to vacate the sanctions imposed against them.

ARGUMENT

I. PETITIONERS' CONDUCT WAS ETHICALLY REQUIRED.

Petitioners' advocacy not only conformed to the state's well-established standards of professional conduct, but was ethically required by these standards. As representatives of a capital defendant, Petitioners had an obligation to zealously defend Mr. Howard by bringing all colorable claims on his behalf. After the Supreme Court's decision in *Hurst* called into question several aspects of Mr. Howard's prior sentencing, Petitioners properly fulfilled their duty by filing a new habeas petition. Petitioners correctly understood the necessity of fully raising all of their client's claims at the state level in order to ensure that their client's rights were protected, as well as to preserve any unsuccessful claims for federal habeas. Thus, Petitioners were ethically obligated to seek to amend the habeas petition once they learned of an additional viable *Hurst* claim.

A. Lawyers Have an Obligation To Serve as Zealous Advocates.

As the Model Rules of Professional Conduct direct, "[a] lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act . . . with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct r. 1.3 cmt. (Am. Bar Ass'n 2016). Lawyers owe their clients basic fiduciary duties of competence and diligence. These duties are enshrined in the Nevada Rules of Professional Conduct and the American Bar Association's Model Rules. *See id*. r. 1.1, 1.3; Nev. R. Prof'l Conduct 1.1 (imposing a duty of "competent representation"); *id*. 1.3 (imposing duties of "diligence and promptness"). As the profession has long recognized, "[a]ssurances of the lawyer's competence, diligence, and loyalty are . . . vital" to a client's fair and adequate representation. *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b (Am. Law. Inst. 2000). Indeed, "the adversarial process protected by the Sixth Amendment *requires* that the accused have 'counsel acting in the role of an advocate.'" *United States v. Cronic*, 466 U.S. 648, 656 (1984) (emphasis added). This right would be a hollow one without zealous representation.

This Court has a long tradition of promoting zealous advocacy. The Court has repeatedly emphasized that it is essential that "attorneys have the utmost freedom to engage in zealous advocacy and are not constrained in their quest to fully pursue the interests of, and obtain justice for, their clients." *Greenberg*

Traurig v. Frias Holding Co., 331 P.3d 901, 904 (Nev. 2014). The freedom to act as a zealous advocate is especially important in the criminal context, as this Court has recognized:

> [W]e view with approval the . . . description of an attorney's duty to defend his or her clients "fully, vigorously, and even with arguments which might be offensive or ultimately unsuccessful. This is particularly true in criminal cases, where the clients' liberties are at stake, and where the adequacy of the attorneys' representation can raise constitutional issues."

Young v. Ninth Judicial Dist. Court, In & For City of Douglas, 107 Nev. 642, 649, 818 P.2d 844, 848 (1991) (quoting *In re Order to Show Cause*, 741 F. Supp. 1379, 1381 (N.D. Cal. 1990)). Moreover, the judicial system has the solemn responsibility of diligently guarding a lawyer's freedom to act as a zealous advocate: "Courts 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.* at 649, 818 P.2d at 848. As explained in the mandamus petition, Petitioners' *Hurst* arguments were colorable claims that Petitioners had a duty to present and preserve. *See* Pet. for Mandamus 26-32. As a result, the court below sanctioned Petitioners for the very zealous advocacy that they were obligated to provide. Accordingly, this Court should overturn those sanctions.

B. The Duty To Serve as a Zealous Advocate Is Heightened in Capital Cases.

The duty of zealous advocacy calls for the most passionate and thorough representation in capital cases because an individual's life is on the line. As this Court has emphasized, "Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making *extraordinary efforts* on behalf of the accused." *Young*, 107 Nev. at 648, 818 P.2d at 848 (emphasis added) (quoting Standards for Criminal Justice § 4-1.2(c) (Am. Bar. Ass'n, 3rd ed. 1991)); *see also Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, it recognized that right in capital cases." (internal citations omitted) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting))).

Because of the irrevocable nature of the death penalty, these cases place extraordinary demands on defense counsel, which do not diminish post-conviction. *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), *reprinted in* 31 Hofstra L. Rev. 913, 950-51 (2003) [hereinafter "ABA Guidelines"]; *see also* Standards for Criminal Justice § 4-1.2(g) (Am. Bar. Ass'n, 4th ed. 2015) ("Because the death penalty differs from

other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused . . . .").

As the Supreme Court has long held, these ABA standards reflect the "[p]revailing norms of practice" and "are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688; *see also Wiggins v. Smith*, 539 U.S. 510, 522-24 (2003) (relying on the ABA Standards for Criminal Justice as a "guide" in evaluating counsel's performance). This Court has also cited the ABA standards as an important guide on defense counsel's obligations in capital cases. *See Young*, 107 Nev. at 649-50, 818 P.2d at 848 (*citing* Standards for Criminal Justice § 4–1.2(c) (Am. Bar Ass'n, 3rd ed. 1991)). Any evaluation of Petitioners' conduct should thus proceed with the high-stakes nature of death penalty litigation in mind. Given that refusing to litigate certain claims or "'[w]innowing' issues in a capital appeal can have fatal consequences," Petitioners were ethically required to make all colorable claims on their client's behalf. ABA Guidelines, *supra*, at 1083.

C. Petitioners' Conduct Was Ethically Required To Fulfill Their Duties of Zealous Advocacy.

Petitioners fulfilled their ethical obligation to "seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation." *Id*. at 1079. This obligation "include[s] not only challenges to the conviction and sentence, but also issues which may arise" after or during the course of the litigation. *Id.* at 1086;

see also Standards for Criminal Justice § 4-7.9 (Am. Bar Ass'n, 3d ed. 1993) ("Defense counsel's responsibility includes presenting appropriate post-trial motions to protect the defendant's rights."). To meet this responsibility, defense counsel "should keep under consideration the possible advantages to the client of . . . asserting legal claims whose basis has only recently become known or available." *Id.* § 10.8. In other words, counsel was obligated to "keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments." *Id.* § 10.15.1(E)(3). Here, *Hurst* was such a subsequent development. In order to zealously advocate for Mr. Howard pursuant to ABA guidelines, Petitioners were required to bring these claims.

Moreover, because of the exhaustion requirement of federal habeas, Petitioners had an additional duty to advance these claims in state court. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (requiring dismissal of a federal habeas petition "if the prisoner has not exhausted available state remedies as to any of his federal claims . . . [T]he States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights."). The ABA advises that "[c]ollateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications." ABA Guidelines, *supra*, at 1086. Counsel "should make every professionally appropriate

effort to present issues in a manner that will preserve them for subsequent review." *Id.* at 1079. Thus, Petitioners' actions were required to fulfill the ABA's exhortation to fashion "a clear and complete record for potential review." Standards for Criminal Justice § 4-1.5 (Am. Bar Ass'n, 4th ed. 2015).

Finally, while the Nevada Rules specify that a lawyer must not bring "frivolous" claims, a claim that "includes a good faith argument for an extension, modification or reversal of existing law" is not frivolous. Nev. R. Prof'l Conduct 3.1. Here, there is a reasonable argument that the United States Supreme Court has already modified the law through its decision in *Hurst*. Petitioners simply importuned the court to apply this modification to Mr. Howard's matter. Given their unique Sixth Amendment duties, the bar for frivolous claims must be relaxed for defense attorneys. *See* Model Rules of Prof'l Conduct r. 3.1 cmt. ("The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule."). As the Nevada Rules recognize, "A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may . . . defend the proceeding as to require that every element of the case be established." Nev. R. Prof'l Conduct 3.1.

Ultimately, "[w]hen a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited." ABA Guidelines, *supra*, at 1083. As a result, Petitioners had no choice but to file the additional claims. The lower court's sanctions in effect punished Petitioners for fulfilling their ethical duties. These sanctions must not be allowed to stand, as they send a signal to capital defenders across Nevada that they may now be penalized for their good faith efforts to comply with the Nevada Rules of Professional Conduct. This will have the deleterious effect of discouraging lawyers from making all colorable claims on behalf of criminal defendants, particularly in capital cases, throughout the state.

II. THE IMPOSED SANCTIONS VIOLATE DUE PROCESS AND WILL CHILL FUTURE PRO BONO ADVOCACY.

A. Judge Villani Violated Due Process by Imposing Sanctions Without Giving Petitioners Notice or an Opportunity To Be Heard.

Judge Villani imposed sanctions on Petitioners without notifying them why the sanctions were being imposed or providing them with an opportunity to contest the sanctions. This violated Petitioners' due process rights under clearly established Nevada case law and procedural rules for the imposition of sanctions.

First, fundamental notions of due process and fairness require that lawyers be put on notice of the alleged grounds for sanctions and be provided an opportunity to contest their impositions. *See Chambers v. NASCO, Inc.*, 501 U.S.

32, 50 (1991) (explaining that a court imposing sanctions "must comply with the mandates of due process"); *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869-70, 900 P.2d 323, 325 (1995) (noting that sanctions should comply with "fundamental notions of fairness and due process"). This Court has consistently supported these due process requirements before any imposition of attorney sanctions. *See, e.g., Lioce v. Cohen*, 124 Nev. 1, 26, 174 P.3d 970, 986 (2008) (holding that "the district court may . . . impose sanctions for professional misconduct at trial, after providing the offending party with notice and an opportunity to respond"); *cf. Whitney v. State, Dep't of Emp't Sec.*, 105 Nev. 810, 813, 783 P.2d 459, 460 (1989) ("Basic concepts of fairness and due process require that one who is charged with a wrongdoing be put on notice as to what conduct constitutes the wrong."). As the Ninth Circuit has also explained, "These minimal procedural requirements give an attorney an opportunity to argue that his actions were an acceptable means of representing his client, to present mitigating circumstances, or to apologize to the court for his conduct." *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir. 2005). Thus, due process protections are indispensable before sanctions are imposed.

To protect these due process requirements, Nevada has clear procedural rules regarding the imposition of sanctions. According to Rule 7.60(b) of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, "[t]he

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 . . . ." EDCR r. 7.60(b) (emphasis added). Similarly, Nevada Rules of Civil Procedure 11(c) allows for the imposition of sanctions only "after notice and a reasonable opportunity to respond." Nev. R. Civ. P. 11.

However, in violation of due process and these clear procedural rules, Judge Villani sanctioned Petitioners without notifying them of the basis for the sanctions, let alone giving them any opportunity to contest their imposition. Neither the journal entry, nor the later signed order purportedly explaining why Petitioners were sanctioned, specified any procedural provisions that would authorize sanctions. Pet. for Mandamus at 35. Here, Petitioners were first notified of the possibility of sanctions in the court's journal entry, at which point the sanctions had already been ordered. *Id.* at 41. Petitioners were thus unable to meaningfully respond to the sanctions order.

Moreover, the mystified and rushed manner in which the sanctions were imposed casts doubt on the fairness of the judicial system. *See* Preface, Standards for Imposing Lawyer Sanctions (Am. Bar Ass'n 1991). (explaining that "inconsistent sanctions . . . cast doubt on the efficiency and the basic fairness of all disciplinary systems"). As the ABA has explained, "the purposes of lawyer

discipline are not served if the sanction is unclear or is conditioned on unnamed factors." Standards for Imposing Lawyer Sanctions 1.2 cmt. (Am. Bar Ass'n 1991). Obfuscating the underlying reasons for the sanctions, as Judge Villani did in this case, will inevitably lead to confusion about what kind of conduct is sanctionable and what conduct should be avoided.

B. Upholding the Sanctions Will Chill Pro Bono Advocacy in Nevada.

Allowing judges to impose sanctions without telling the lawyers why they are being sanctioned will have a profound chilling effect on pro bono advocacy in Nevada. Sanctioning lawyers without explanation may deter private lawyers from taking on pro bono capital matters in the first place. These lawyers may fear not only the direct monetary losses incurred by sanctions, but also the long-term reputational harms associated with sanctions, which could impede their future ability to attract private clients.

Lawyers suffer reputational harms from sanctions, even when they are symbolic or seemingly minor in nature. *See Lasar*, 399 F.3d at 1109 (noting that sanctions can have "adverse effects upon counsel's careers and public image" (citing *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1200 n.14 (11th Cir. 1985)). In Nevada, each lawyer must publish biographical data that includes all disciplinary sanctions imposed by any court, which makes it particularly likely that reputational harms will result. *See* Nev. R. Prof'l Conduct 1.4(c). Lawyers, such as Petitioner

Paola Armeni, who volunteer their time to represent indigent death row inmates, should be encouraged to do so; the sanctions imposed here have the opposite effect. By sending a message that lawyers who zealously advocate on behalf of their clients will be punished without due process, these sanctions discourage pro bono representation.

This is particularly disturbing to *amicus* because, as a matter of professional responsibility, promoting pro bono service is critical to ensuring access to the legal profession. *See, e.g.*, Nev. R. Prof'l Conduct 6.1(a) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay."); *Access to Justice & Pro Bono,* State Bar of Nevada, http://www.nvbar.org/member-services-3895/pro-bono/ ("The Nevada Supreme Court Access to Justice Commission and the State Bar of Nevada strongly advocates that all attorneys utilize their legal skills and resources to participate in pro bono service.").

The ABA specifically encourages pro bono service in capital habeas proceedings and singles this out as a unique example of an important type of pro bono service. As the ABA explains, pro bono work "can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, *such as post-conviction death penalty appeal cases*." Model Rules of Prof'l Conduct r. 6.1 cmt. 1 (emphasis added). Leaving these sanctions in place sends the message that lawyers

volunteering their time for pro bono work run the risk of being sanctioned for unknown reasons, particularly if they take on extremely challenging and time consuming cases such as post-conviction death penalty cases. Such a result is repugnant to the bedrock of our profession—that we must continuously strive to "ensure equal access to our system of justice for all." Model Rules of Prof'l Conduct pmbl.

III. JUDGE VILLANI SHOULD NOT HAVE MADE THE SANCTIONS PAYABLE TO THE DISTRICT ATTORNEY'S OFFICE.

Even if this Court finds that Judge Villani was justified in imposing sanctions, the sanctions should not have been made payable to the Clark County District Attorney's Office. As the U.S. Supreme Court has cautioned, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980); *see also* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 881 (1995) ("The lesson we should take from history is that financial rewards can induce prosecutors to modify their behavior to conform to the incentives created by the rewards.").

Similarly, although the judge imposed sanctions *sua sponte*, making the sanctions payable to the Clark County District Attorney's Office creates a perverse incentive for future prosecutors to seek sanctions aggressively by accusing the defense of wrongdoing. *See* Pet. for Mandamus at 46-48. This type of incentive setting is particularly concerning given the history of prosecutorial misconduct at the Clark County District Attorney's Office, including in the case of this defendant, Mr. Howard, whose detention Petitioners now challenge.[2]

Rather than make sanctions payable to the prosecutor's office, Judge Villani had several alternative options at his disposal that would not have raised any ethical concerns. Under the Nevada Rules, judges are explicitly given discretion to direct payment of civil sanctions imposed against counsel to a nonprofit entity or law library. Nev. R. Prof'l Conduct 6.1(e). In fact, in the context of the Rules' express provisions surrounding access to justice issues, district judges seem to be *encouraged* to direct their sanctions toward entities that would increase the provision of affordable legal services. *See* Nev. R. Prof'l Conduct 6.1(c) (describing the purpose of the voluntary pro bono plan "to make available legal

[2] In Mr. Howard's first state post-conviction case, this Court found that one of the prosecutors committed misconduct and referred the prosecutor to the state disciplinary board after the prosecutor made several improper remarks in his closing argument during Mr. Howard's penalty phase. *See Howard v. State*, 106 Nev. 713, 723, 800 P.2d 175, 181 (1990). The Court noted that the prosecutor had "a history of persistent disregard for established rules of professional conduct regarding improper argument before a jury." *Id.* at n.1.

services to those Nevadans who cannot otherwise afford them and to expand the present pro bono programs"); Nev. R. Prof'l Conduct 6.1(d) (authorizing district court Pro Bono Committees to establish a local foundation to promote affordable civil legal services and "receive . . . monies from the courts"); *cf. Thomas v. City of N. Las Vegas*, 122 Nev. 82, 96, 127 P.3d 1057, 1067 (2006) (imposing sanctions payable to the Supreme Court of Nevada Law Library). Alternatively, Judge Villani could have ordered that sanctions be paid to the court. *See Young*, 107 Nev. at 46, 818 P.2d at 846.

It is baffling to *amicus*, and of serious ethical concern, that Judge Villani instead made the unusual decision of making the sanction payable to the district attorney's office, thereby creating a financial incentive for prosecutors to accuse future zealous defense counsel of misconduct.

IV. IF REMANDED, THIS CASE SHOULD BE REASSIGNED TO ANOTHER JUDGE TO PROTECT THE JUDICIARY'S CREDIBILITY.

The *sua sponte* decision of Judge Villani to impose sanctions on Petitioners in this case—without articulating a clear reason, without providing Petitioners notice or opportunity to be heard, and without making that fine payable to a neutral entity—has created the appearance of judicial unfairness and impropriety. Accordingly, if this Court decides to remand, *amicus* believes it should do so with instructions to the District Court to assign the matter to a different judge.

Reassigning to a different judge is necessary in order to protect the credibility and respect of the Nevada State Courts and our justice system. As the Nevada Code of Judicial Conduct (NCJC) observes, "[a]n independent, fair and impartial judiciary is indispensable to our system of justice." Nev. Sup. Ct. R. CJC Preamble. The perceived impartiality of judges is crucial to inspire public confidence in the justice system. Canon 1 provides that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Nev. Sup. Ct. R. CJC, Canon 1. Further, the Preamble provides that "[j]udges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives." Nev. Sup. Ct. R. CJC Preamble. As Comment 1 to Rule 2.4 provides, "[c]onfidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." Nev. Sup. Ct. R. CJC 2.4 cmt. 1. Judge Villani's decision making with respect to this case could reasonably be seen as "subject to inappropriate influences."

"The test for appearance of impropriety," as described by the comments to the NCJC, is "whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Nev. Sup. Ct. R. CJC r. 1.2 cmt. 5. Given Judge Villani's impatience with Petitioners' legitimate efforts to protect their client and his seemingly rash, *sua sponte* decision to impose sanctions on the defense in the manner that he did, a reasonable mind could expect Judge Villani to exhibit partiality in favor of the prosecution going forward.

This Court and many others have maintained that reassignment to a different judge is warranted for reasons of substantive justice and to avoid the appearance of impropriety. *See e.g.*, *Echeverria v. State*, 119 Nev. 41, 44, 2 P.3d 743, 745 (2003) ("reject[ing] the State's argument that reassignment to a different judge is appropriate only in unusual cases."); *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993) (explaining that the court had previously "ordered that the sanctions matter be reassigned to another judge on remand . . . not because of any inability of [the trial judge] to act impartially, but instead 'to preserve the appearance of justice' in what had become a complicated and acrimonious case." (quoting *In re Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986))). In the specific context of sanctions, the Ninth Circuit has articulated three factors relevant to the determination of whether a case should be reassigned to another judge. *Amicus* urges the Nevada Supreme Court to consider the Ninth Circuit's three-pronged test:

> (1) [W]hether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind

> previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and, (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Jacobs, 855 F.2d 652, 656 (9th Cir. 1988).

The Ninth Circuit explained that "[t]he first two of these factors are of equal importance, and a finding of either one of them would support a remand to a different judge." *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 2003). In *United States v. Jacobs*, the Ninth Circuit held that it "must order reassignment to preserve the appearance of justice." *See United States v. Jacobs*, 855 F.2d at 656. In order to protect the appearance of justice and public confidence in the judiciary, reassignment is likewise appropriate in this case.

Here, the potential for judicial partiality is particularly worrisome, as Judge Villani appears to have expressed favoritism for the prosecution over the defense, going so far as to order the defense to pay the prosecution. In doing so, Judge Villani has failed to exercise due restraint, which is crucial to the fair imposition of sanctions. As the Ninth Circuit has noted,

> A troublesome aspect of a trial court's power to impose sanctions . . . is that the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed. The absence of limitations and procedures can lead to unfairness or abuse.

F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1137 (9th Cir. 2001) (citation omitted). Accordingly, the bar for appropriate discretion and restraint is high when it comes to imposing sanctions on lawyers, particularly when the lawyers are defense counsel in a habeas matter and their client's life is at stake. *See, e.g.*, *Chambers*, 501 U.S. at 44 (asserting that "[b]ecause of their very potency, inherent powers [to sanction] must be exercised with restraint and discretion.").

Judge Villani failed to exercise the restraint and discretion necessary for carrying out justice and preserving the appearance of judicial impartiality. Even if the sanctions were appropriate (which they were not), Judge Villani denied Petitioners their right to be heard. This error violates the Nevada Code of Judicial Conduct, Rule 2.6, which notes that "[a] judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law." Nev. Sup. Ct. R. CJC 2.6. This matter should not be remanded to the same judge because Judge Villani flouted clear procedural and ethical rules regarding the imposition of sanctions.

Amicus concludes that Judge Villani's treatment of this matter would lead reasonable people to believe that Petitioners were sanctioned for zealously representing their client. The sanctions that Judge Villani imposed, in addition to the way in which he imposed them, give rise to substantial doubt that he would

handle this matter impartially on remand. Accordingly, justice requires that, if remanded, the case be heard by a different trial judge.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to vacate the sanctions imposed upon Petitioners.

Dated: October 18, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief 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:

[**X**] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font size.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[**X**] Proportionately spaced, has a typeface of 14 points or more and contains 5,388 words.

Finally, I hereby certify that I have read this amicus brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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