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

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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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, Respondent, And TIMOTHY FILSON, Warden, ADAM PUAL LAXALT, Attorney General for the State of Nevada, and THE STATE OF NEVADA, Real Party in Interest.	CASE NO: 73462 D.C. NO: 81C053867

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, Jonathan E. VanBoskerck, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed December 1, 2017, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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/ / /

Dated this 21st day of December, 2017.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The District Court summarized the procedural history of this case as follows:

> On May 20, 1981 Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.
>
> Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.
>
> On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.
>
> Howard's counsel requested a one-week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.
>
> Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.
>
> A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status

at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.

At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.

On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally, counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The district court canvassed

Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felony - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he did not understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the

felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remitittur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remitittur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with

"future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[1]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705

[1]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

P.2d 1126 (1985)[2]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[3]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could proceed in Federal court.

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[2] Collier was decided two years after Howard's trial.

[3] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally, the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second

degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one-year limit) and NRS 34.800 (five-year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and

second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[4]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[5] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010, dismissing the Fourth State Petition as procedurally barred. A written Findings of Fact and Conclusions of Law was filed on November 6, 2010.

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[4] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

[5] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010.

Petitioner challenged this Court's decision before the Nevada Supreme Court. Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, 128 Nev. 736, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented Howard. Id. at 747, 291 P.3d at 144. A cover sheet indicated that the motion was sealed but the FPD failed to file a separate motion to seal the pleading. Id. at 739, 291 P.3d at 139. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at 748, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. (Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014). The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 1898 (2015).

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) on October 5, 2016. Respondent filed an opposition and motion to dismiss on November 2, 2016. On March 27, 2017, Petitioner filed an opposition to the State's request to dismiss the Fifth Petition. Respondent's reply to Petitioner's opposition was filed on April 4, 2017.

On December 1, 2016, Petitioner filed an Amended Fifth Petition. The State moved to strike the Amended Fifth Petition for failing to comply with NRS 34.750(5). Petitioner opposed this request. This Court held a hearing on March 17, 2017, and after entertaining argument, struck the Amended Fifth Petition pursuant to NRS 34.750(5) and Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). An order memorializing this decision was filed on April 7, 2017.

On April 6, 2017, Petitioner filed a Motion to Amend or Supplement that requested reconsideration of this Court's decision to strike his Amended Fifth Petition without requesting leave to do so in advance. Respondent filed an opposition on April 12, 2017, and Petitioner replied on April 17, 2017.

Howard's Fifth Petition and Motion to Amend or Supplement came before this Court on the April 19, 2017, Chamber Calendar. On May 2, 2017, this Court issued a minute order denying the Fifth Petition and the Motion to Amend or Supplement and 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 Petition and/or for failing to seek leave of court prior to requesting reconsideration.

Appellant's Appendix (AA), Volume 3, p. 515-27 (footnotes in original).[6]

Petitioners sought extraordinary relief from the District Court's $250.00 sanction on July 14, 2017. (Petition for Writ of Mandamus (Petition), filed July 14, 2017). This Court directed the State to file an answer on December 1, 2017. (Order Directing Answer, filed December 1, 2017).

Petitioners sought consolidation of this matter with the appeal from the District Court's denial of habeas relief. (Petitioner's Motion to Consolidate, filed July 17, 2017). The State opposed. (Opposition to Motion to Consolidate, filed July 18, 2017). This Court denied consolidation on October 12, 2017. (Order, filed October 12, 2017).

The American Civil Liberties Union of Nevada (ACLU) and the Ethics Bureau at Yale (EBaY) sought leave to file amicus briefs. (Motion for Leave to File Amicus Curiae Brief, filed October 11, 2017; Motion to File Amicus Curiae Brief Pursuant to NRAP 29 and for Leave to File Late Brief, filed October 18, 2017). The State opposed both requests. (Opposition to Motion for Leave to File Amicus Curiae Brief, filed October 16, 2017; Opposition to Motion for Leave to File Amicus Curiae

[6] Petitioners' erroneously title their appendix Appellant's Appendix even though this matter is one seeking extraordinary relief. The State has followed Petitioners' naming convention in order to avoid confusion.

Brief Pursuant to NRAP 29 and for Leave to File Late Brief, filed October 20, 2017). This Court granted Petitioners' allies the privilege of intervening in this litigation and ordered the State to respond to the amicus briefs on December 6, 2017. (Order Granting Motions, filed December 6, 2017). The Amicus Brief of American Civil Liberties Union of Nevada Foundation and American Civil Liberties Union Foundation in Support of Petitioners (ACLU Brief) was filed on December 6, 2017. (Amicus Brief of American Civil Liberties Union of Nevada Foundation and American Civil Liberties Union Foundation in Support of Petitioners, filed December 6, 2017). The Brief of the Ethics Bureau at Yale as Amicus Curiae in Support of Petitioners (EBaY Brief) was also filed on December 6, 2017. (Brief of the Ethics Bureau at Yale as Amicus Curiae in Support of Petitioners, filed December 6, 2017).

STATEMENT OF FACTS

The District Court summarized the factual background of this case as follows:

> On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his

car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.

Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.

Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned, he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he could not rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.

Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.

Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it

listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m., Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no

one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again, Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and

Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he did not know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m., Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an

automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[7]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he was not sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he could not be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet

[7] This evidence was admitted to show identity and motive for the Monahan murder.

> and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.
>
> Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[8] Howard also stated he was on veteran's disability in New York.[9] He said he was in various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he did not want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

3 AA 509-15.

ARGUMENT

Judge Villani's decision to hold Petitioners accountable for their gamesmanship and repeated violations of basic Nevada procedural rules was well within his inherent authority. More importantly, it sends a clear message that no attorney is above the law and that each of us disregards our obligation to play by the rules to our peril.

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

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[8] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[9] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

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.

Petitioners' skullduggery continued after filing the fifth state habeas petition on October 5, 2016. 3 AA 526. 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.

Petitioners started this process through the gamesmanship of waiting until the eve of the one-year time bar of NRS 34.726 kicking in to file. 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 disregarded 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).

Under these facts, the District Court acted well within its inherent authority and did not abuse its discretion in holding Petitioners accountable for their hubris and/or lack of competence. Id.

I. STANDARD OF REVIEW

The court may issue a writ of mandamus to enforce "the performance of an act which the law enjoins as a duty especially resulting from an office . . . or to compel the admission of a party to the use and enjoyment of a right . . . to which he

is entitled and from which he is unlawfully precluded by such inferior tribunal." NRS 34.160.

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe 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).

However, mere recitation of the standard does not do justice to the meaning of the rule:

> *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.Commw.Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is

overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

State v. Eighth Judicial District Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (emphasis added).

II. DISTRICT COURT HAD INHERENT AUTHORITY TO SANCTION PETITIONERS

Petitioners and EBaY complain that Judge Villani lacked authority under NRS 7.085, NRS 18.010, SCR 39, SCR 99, NRCP 11 and/or EDCR 7.60 to impose sanctions. (Petition, p. 35-36; EBaY Brief, p. 13). However, the District Court's inherent authority to police attorney conduct operates independently from any statutory or rule based power. Young v. Ninth Judicial District, 107 Nev. 642, 647, 818 P.2d 844, 847 (1991) ("Because we have concluded that the inherent disciplinary authority of the district courts constitutes the proper jurisdictional basis for the imposition of sanctions in the instant case, we elect not to address the suggestion that NRCP 11 is applicable to criminal cases"). As such, Petitioners contentions are irrelevant as Judge Villani clearly had inherent authority to hold them accountable for their intentional misconduct.

III. THIS COURT MAY DISCERN THE SOURCE OF THE DISTRICT COURT'S AUTHORITY TO IMPOSE SANCTIONS

Petitioners and EBaY argue that the sanctions are invalid because Judge Villani failed to identify the source of his power to sanction Petitioners. (Petition, p. 35-36; EBaY Brief, p. 13). This contention ignores the fact that Judge Villani is

presumed to know the law and thus would have made it clear which statute or rule he was relying upon if not inherent authority. Further, this Court may discern the authority utilized based upon the record.

A judicial officer is presumed to know and follow the law. Colwell v, State, 118 Nev. 807, 814, 59 P.3d 463, 468 (2002) ("we presume that the sentencing judges understood and met their responsibilities"); Pray v. State, 114 Nev. 455, 458, 959 P.2d 530, 532 (1998) ("trial judges are presumed to know the law and to apply it in making their decisions"); Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991) ("Trial judges are presumed to know the law and to apply it in making their decisions"). Based upon the alleged difficulties identified by Petitioners and their allies regarding application of the various statutory and rule based authority for the imposition of sanctions, this Court should conclude that Judge Villani imposed the $250 sanction pursuant to his inherent authority to police attorney conduct.

Further, this Court may discern the basis for the sanctions based on the lower Court's conduct. Gyler v. Hampton, 234 F.App'x 639, 694 (9th Cir. 2007) ("That the district court failed to specify its authority for awarding the Gylers sanctions neither invalidates the sanctions imposed nor requires remand. We can discern the source of district court's powers for purposes of review."); Primus Auto Fin. Servs. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) ("Although the District Court failed to specify the authority for its order, we can deduce the source of its power for purposes

of our review"). That Judge Villani was exercising inherent authority is clear from the fact that he did not specify a particular statute or rule in his order.

Judge Villani's conduct was consistent with how this Court exercises inherent authority. The minute entry and the final order both outlined the conduct supporting sanctions and then imposed sanctions. 2 AA 475-76; 3 AA 528-29, 535. Similarly, in Greene v. State, 113 Nev. 157, 170, 931 P.2d 54, 62 (1997), this Court noted that a prosecutor engaged in misconduct and then summarily fined the offending attorney $250.00. Accord, Burke v. State, 110 Nev. 1366, 1368-70, 887 P.2d 267, 268-69 (1994) (attorney removed from appeal and summarily sanctioned for failing to comply with appellate procedural rules); McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984) (prosecutor summarily fined $500 on appeal for trial misconduct).

IV. THE RECORD IS SUFFICIENT TO ALLOW REVIEW

Petitioners and EBaY also complain that the lack of a record related to the sanctions deprives this Court of a reviewable record and precludes Petitioners from effectively challenging the sanctions. (Petition, p. 36-40; EBaY Brief, p. 12-14). These claims are belied by the record and should be summarily disregarded by this Court. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The minute entry and the order explain why Judge Villani imposed sanctions. 2 AA 475-76; 3 AA 528-29, 535. As to Petitioners' related complaint, that Judge Villani failed to justify the specific monetary amount of the sanction, there is no such requirement.

A sanction imposed pursuant to the inherent authority of a court is designed to deter attorney misconduct. As such, a court may pick a monetary amount reasonably designed to achieve that goal. United States v. Kouri-Perez, 8 F.Supp.2d 133, 140 (D.P.R. 1998) ("We do not see the need to justify the monetary sanction with the government time sheet documenting the hours devoted to this effort and the expense incurred"). Indeed, $250 appears to be the default entry level sanction amount utilized by this Court. Greene, 113 Nev. at 170, 931 P.2d at 62; Stovall v. McDonald, No. 69291, 2016 Nev. Unpub. LEXIS 570 (2016). Regardless, if this Court deems the record insufficient, the matter should be remanded to Judge Villani to expand the record. Ryan's Express Transportation Services, Inc. v. Amador Stage Lines, Inc., 128 Nev. 289, 300-01, 279 P.3d 166, 173 (2012).

V. PETITIONERS RECEIVED ALL THE NOTICE AND OPPORTUNITY TO BE HEARD THEY WERE DUE

Petitioners and EBaY contend that Petitioners were denied notice and an opportunity to be heard regarding imposition of sanctions. (Petition, p. 40-46; EBaY Brief, p. 11-14). Petitioners have waived this complaint. Regardless, they had a chance to challenge the sanction below and failed to do so.

Petitioners begin their argument with a misrepresentation of the record. Petitioners contend that "[b]y the time the petitioners learned of the sanctions in the journal entry, it was in the form of an 'order[.]'" (Petition, p. 40-41). This statement is absolutely belied by the record. On May 10, 2017, an employee of the District

Attorney's Office e-mailed a copy of the proposed Findings of Fact, Conclusions of Law and Order to Assistant Federal Public Defenders Jonah J. Horwitz and Deborah Czuba as well as Paola M. Armeni. 3 AA 538.[10] The e-mail specifically informed Mr. Horwitz and Ms. Czuba that "we will be presenting these Findings to the Court on May 12, 2017, in compliance with the Judge's Minute Order." Id. The Findings of Fact, Conclusions of Law and Order was not signed until May 15, 2017. 3 AA 536. Clearly, Petitioners personally had the text of the proposed order five days prior to the judge formalizing it as an order. See, Division of Child & Family Services v. District Court, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004) ("dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed and filed before they become effective").

It is undisputable that Petitioners had five days notice of the text of the Findings of Fact, Conclusions of Law and Order prior to it being formalized as an order. 3 AA 538. The purpose of this notice is to allow an opposing party notice and an opportunity to be heard regarding the contents of any proposed order:

> Nevada Code of Judicial Conduct (NCJC) Canon 3B(7) requires the district court to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard." The commentary on this section, which provides guidance to the district

[10] The e-mail addresses used to provide notice to Petitioners are the same as Petitioners placed on their pleading below. Compare 1 AA 22, 1 AA 164 and 3 AA 358.

> court on its ethical obligations, specifically notes that the district court may request a party to submit proposed findings of facts and conclusions of law, but it must ensure that the "other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions."

Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007).

Petitioners received notice and did nothing with that opportunity. If Petitioner wanted to challenge the sanctions, they should have filed an objection to the proposed order or sought clarification of the minute order. In Byford, this Court noted that there was no authority to suggest that a party had an obligation to file an objection to proposed orders. Id. at 70, 156 P.3d at 692-93. However, the failure to pursue relief below generally precludes appellate review. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P .2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P .2d 578, 584 (1992), cert. denied, 507, U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P .2d 1169, 1173 (1991). This general principal should apply with even greater force in the context of extraordinary relief. As such, Petitioner has waived this claim.

Regardless, the level of notice and opportunity to be heard provided to Petitioners was in accord with how this Court exercises its inherent authority to sanction attorney misconduct. In Greene, this Court was asked to adjudicate claims of prosecutorial misconduct. Greene, 113 Nev. at 168-72, 179-80, 931 P.2d at 61-63, 68. After finding that the prosecutor engaged in misconduct, this Court

publically castigated the prosecutor and imposed a $250 fine without providing the prosecutor notice of possible sanctions or an opportunity to be heard on the appropriateness of the punishment. Id. at 170, 931 P.2d at 62.

VI. PETITIONERS WERE APPROPRIATELY SANCTIONED

Despite their laundry list of excuses, Petitioners never address the underlying conduct that caused them to be sanctioned. Regardless of all the irrelevant arguments as to why Petitioners should not be held to the same standard as every other attorney who files a pleading, the truth is that Petitioners started this litigation by playing games and repeatedly ignored basic procedural rules. Judge Villani punished them not because of who they were representing or what they were saying but because they chose to act like they were above the law.

The rules apply to the FPD. Barnett v. LeMaster, 12 Fed.Appx. 774, 778-79 (10th Cir. 2001) ("Because of the misrepresentation committed in this case, we admonish the Office of the Federal Public Defender and its attorney and warn them that further violations of this nature will result in appropriate sanctions"); United States v. Burleson, 22 F.3d 93, 95 (5th Cir. 1994) ("This appeal borders on being frivolous. We caution counsel, Federal Public Defenders are like all counsel subject to sanctions. They have no duty to bring frivolous appeals, the opposite is true."); United States v. Montanez-Ortiz, 290 F.R.D.33 (2013) (FPD required to publish protocol regarding subpoenas "accompanied by notice to all staff of the Office of

the Federal Public Defender, citing the impropriety of the illegal procedure employed in this case" and "as a modest sanction, the documents produced by the Puerto Rico Police under the improperly-used subpoena will be made available to the government"). Indeed, the FPD has received more than mere warnings for misconduct. ABA Journal (July 1, 2014) ("Federal PDs have 40 days to explain inmate's letter saying he did not authorize SCOTUS appeal") (http://www.abajournal.com/news/article/federal_pds_have_40_days_to_explain_inmates_letter_saying_he_didnt_authoriz); Ballard v. Pennsylvania, 2014 U.S. LEXIS 4780 (2014) (unauthorized certiorari petition resulted in a referral *by the United States Supreme Court* to the Pennsylvania Supreme Court's Disciplinary Board).

This Court has warned that rules exist for a reason and 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).

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

Here, the rule that was violated is the bar against seeking reconsideration without first requesting leave of court. The District Court Rules make clear that once an issue has been disposed of a party may not reassert the same complaint without securing leave of court in advance:

> No motion once heard and disposed of shall be renewed in the same cause, *nor shall the same matters therein embraced be reheard, unless by leave of court granted upon motion* therefor, after notice of such motion to the adverse parties.

DCR 13(7) (emphasis added).

The Eighth Judicial District Court Rules similarly bar litigants from repeatedly seeking the same relief:

> When an application or a petition for any writ or order has been made to a judge and is pending or has been denied by such judge, the same application, petition or motion may not again be made to the same or another district court judge, except in accordance with any applicable statute and upon the consent in writing of the judge to whom the application, petition or motion was first made.

EDCR 7.12.

The Fifth Petition raised only one issue, whether appellate reweighing of aggravating and mitigating circumstances was unconstitutional in light of Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). 1 AA 28-29. The Fifth Petition was silent as to whether the beyond a reasonable doubt standard applies to the original weighing decision by the penalty jury. Id. Petitioners raised the burden of proof issue in Claims One and Two of the Amended Fifth Petition as it related to appellate

reweighing and the original jury determination. 1 AA 170-72. After the amended petition was struck, Petitioners sought reconsideration of the decision to strike by requesting leave to amend without first requesting permission to pursue reconsideration. 2 AA 372-438.

This amounts to a request for reconsideration because Petitioner addressed amendment of the Fifth Petition to include the claims of the Amended Fifth Petition in his pleading opposing the State's request to strike the Amended Fifth Petition. 2 AA 207-23. In opposing the State's request to Strike, Petitioners complained that they were not required to request leave of court to file an amended petition. 2 AA 207-12. Petitioners further argued that retroactive permission should be granted based on Rule 15 of the Nevada Rules of Civil Procedure (NRCP), federal authority and precedents from sister states. 2 AA 212-23; 2 AA 374-84.

Petitioners were also given an opportunity to argue for amendment at the March 17, 2017, hearing. 2 AA 355-62. Judge Villani pointed out that federal court has hard and fast rules governing amendments. 2 AA 358. Petitioners agreed that "in federal court it's very well established that you have to seek leave to amend." 2 AA 360. Petitioners admitted that "if a party filed an amended petition without seeking leave in advance it would be stricken[.]" Id. Petitioners contended that they researched this issue and even consulted with local post-conviction counsel to determine the rule in Nevada. 2 AA 360. However, Petitioners never explained how

they missed the extensive Nevada authority directly on point. NRS 34.750(5); Barnhart v. State, 122 Nev. 301 303-04, 130 P.3d 650, 652 (2006); Miles v. State, 120 Nev. 383, 385, 91 P.3d 588, 589 (2004). Nor did Petitioners explain how their inquiry with local post-conviction counsel never revealed that the Nevada branch of the FPD had previously had pleadings struck for failing to comply with NRS 34.750(5):

> MR. VANBOSKERCK: Mr. Peschetta is the -- basically the team chief of the FPD's capital habeas litigation unit here in Las Vegas. In --
>
> MS. CZUBA: That's not true, Your Honor. He's not the chief anymore.
>
> MR. VANBOSKERCK: Okay, but he was at one point.
>
> THE COURT: I'm going to have one person argue the motion and that is my rule and I stick to that rule.
>
> Go ahead, Counsel.
>
> MR. VANBOSKERCK: If I'm factually incorrect, Your Honor, I apologize. I would submit that he was at one point team chief, and in fact, is -- his name is well known as a habeas litigator here in Clark County for the Defense side.
>
> In Larry Adams, two of those motions to strike on the basis of NRS 34.750(5) were granted before they even filed their petition here. So, all they had to do was pick up the phone and talk to someone at their own office located here to hear that judges here were enforcing it.

2 AA 361. See, 2 AA 255-63 (orders striking pleadings in Adams).

As such, Petitioners' motion to amend amounted to a request for reconsideration because the Court had already considered and rejected amendment.

DCR 13(7) ("No motion once heard and disposed of shall be renewed in the same cause, *nor shall the same matters therein embraced be reheard, unless by leave of court granted upon motion*") (emphasis added). Petitioners try to escape the fact that Judge Villani's decision on March 17, 2017, addressed the appropriateness of an amended pleading by again misrepresenting the record. Petitioners contend that they requested and were granted leave to file a motion to amend. (Petition, p. 17). While Petitioners did request leave, Judge Villani certainly did not grant it. When taken in context, the Court's "all right" was nothing more than an acknowledgment that Judge Villani heard Petitioners' statement. In response to Petitioners request to file a motion, the Court stated: "All right. Thank you." 2 AA 365. At other points during the hearing Judge Villani used the phrase "all right" as a verbal cue indicating that he had heard what had been said and was moving on. 2 AA 354 (lines 13, 21), 355, 366, 370. Indeed, immediately before the "all right" Petitioners rely upon, Judge Villani used the phrase as an acknowledgment that he heard a statement. 2 AA 365, line 19. Additionally, Judge Villani allowed Petitioners to file a reply to another pleading and in doing so set a briefing schedule. 2 AA 370. The fact that he did not do so as to any alleged grant of leave to pursue amendment of the petition further belies Petitioners' claim.

Petitioners other excuses are equally irrelevant. Petitioners and their allies argue that Judge Villani's sanctions interfere with their ethical obligation to provide

their client with zealous advocacy. (Petition, p. 26, 31; EBaY Brief, p. 4-11; ACLU Brief, p. 2-15). They complain that Judge Villani is impeding their access and that of their client to the courts. (Petition, p. 21; ACLU Brief, p. 16-17). They contend that Judge Villani is preventing them from preserving this issue for federal habeas review. (Petition, p. 27; ACLU Brief, p. 13-15). They allege that Judge Villani is treading upon their right to free speech. (Petition, p. 21; ACLU Brief, p. 17-19). The ACLU believes that Judge Villani was retaliating against Petitioners. (ACLU Brief, p. 19-21). And all complain that the sanctions will have a chilling effect upon defense advocacy. (Petition, p. 22, 30; EBaY Brief, p. 14-16; ACLU, p. 3, 9).

All of these complaints share one fatal defect. They are offered without reference to what actually happened below. The ability of Petitioners and their allies to string together legal concepts is impressive but it is meaningless without application of those rules to the facts. Zealous advocacy, access to the courts, freedom of speech, freedom from retaliation and the need to preserve issues for review all must be tempered by compliance with procedural responsibilities. Nevada Rules of Professional Conduct (NRPC) Rule 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for representation); Middleton v. Warden, 120 Nev. 664, 98 P.3d 694 (2004) (attorney removed from capital appeal for repeated failure to comply with the rules of appellate procedure); Moran v. Bonneville Square Assocs., 117 Nev. 525, 25 P.3d

898 (2001) (Court imposed a $500 sanction for failing to comply with the rules of appellate procedure); Burke, 110 Nev. at 1368-70, 887 P.2d at 268-69 (attorney removed from appeal and summarily sanctioned for failing to comply with appellate procedural rules); Smith v. Emery, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993) (Court imposed a $1,000 sanction for failure to comply with Rule 28 of the Nevada Rules of Appellate Procedure); Young, 107 Nev. 642, 818 P.2d 844 (declining extraordinary relief from sanction for frivolous filing that interjected needless delay); McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984) (prosecutor summarily fined $500 on appeal for trial misconduct); Whipple v. Second Judicial District Court, No. 68668, 2016 Nev. Unpub. LEXIS 921 (extraordinary relief from sanction imposed for frivolously filing a re-noticed motion containing factual assertions that were without evidentiary support); Kouri-Perez, 8 F.Supp.2d at 140-41 (mistreatment of prosecutor coupled with failure to comply with court rules warranted a $4,000 sanction). This Court has pointed out that sanctions are not intended to chill advocacy. Marshall v. Eighth Judicial District Court, 108 Nev. 459, 464, 836 P.2d 47, 51 (1992). Even the most basic liberties may be significantly burdened by the obligations an attorney owes to the judiciary. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071-76, 111 S.Ct. 2720, 2743-45 (1991).

Judge Villani did not sanction Petitioners for fighting for their client. Instead, he held them accountable for failing to comply with DCR 13(7) and EDCR 7.12.

These rules protect the judiciary from repeated requests for the same relief and thus promote judicial economy and efficiency. See, Whitehead v. Nevada Com'n. on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing ... The obvious reason for this rule is that successive motions for rehearing tend to unduly prolong litigation"); Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

Even if this Court believes the sanction was not appropriate, extraordinary relief should still be denied because Petitioners do not have clean hands. Truck Ins. Exch. v. Swanson, 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008) (doctrine of clean hands precludes equitable relief where a litigant has "engaged in improper conduct in the matter in which that party is seeking relief"). Petitioners started this process through the gamesmanship of waiting until the eve of the one-year time bar of NRS 34.726 kicking in to file. 2 AA 460-62. They next filed an amended petition without seeking leave of court as required by NRS 34.750(5). When Judge Villani struck that pleading Petitioners then sought reconsideration without seeking leave of

court in violation of DCR 13(7) and EDCR 7.12. Ultimately, Petitioners would not have been in this situation if they had not waited until the last minute to file the Fifth Petition. Petitioners indicate that they discovered the second claim from the amended petition when responding to the State's opposition and motion to dismiss. (Exhibit 1, p. 1, attached to Petition). This being the case, if Petitioners had not attempted to delay these proceedings by waiting until the eve of the filing deadline to file the Fifth Petition they could have filed a Sixth Petition within the statutory deadline alleging the second claim and would not have needed to seek leave to file an amended petition. All this came about because Petitioners were playing games with the goal of delaying this habeas proceeding in order to frustrate the execution of sentence. See, Rhines v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1535 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."); In re Reno, 55 Cal.4th 428, 515, 283 P.3d 1181, 1246 (Cal. 2012) ("death row inmates have an incentive to delay assertion of habeas corpus claims"); Commonwealth v. Spotz, 610 Pa. 17, 160-93, 18 A.3d 244, 329-49 (Pa. 2011) (concurrence of Chief Justice Castille, criticizing FPD for intentional delay of capital habeas proceedings; describing pleadings as prolific, abusive and offered in bad faith; and indicating that FPD strategies were ethically dubious).

Petitioners were not sanctioned for zealous advocacy. Petitioners were punished for misbehavior that they themselves would have argued amounted to ineffective assistance of counsel if it had been committed by trial, appellate or first post-conviction counsel. The issue is not the zealousness of Petitioners or the issue they were advocating. Instead, what is at issue is whether Petitioners should be held accountable for repeated misconduct that brings into question their ability to competently represent their client. To the extent that the sanctions have a chilling effect on such incompetence of counsel, the legal profession will be better for it.

VII. THE COURT APPROPRIATELY ORDERED THE SANCTION PAID TO THE DISTRICT ATTORNEY

Petitioners and their allies offer little or no on point legal authority justifying their vague concerns about greedy prosecutors being spurred to create hours upon hours of additional work to impose sanctions upon hapless defense lawyers in order to enrich the public coffers at the expense of other government agencies.

Regardless of such generalized fears, numerous courts have approved of sanctions payable to a government agency acting as a litigant. Castellanos Grp. Law Firm, L.L.C. v. F.D.I.C. (MJS Las Croabas Props., 545 B.R. 401, 423 (B.A.P. 1st Cir. 2016) (approving of sanctions payable to the government because they were not a fine but instead "for wasted time and efforts"); Gattuso v. Pecorella, 733 F.2d 709 (1984) (appellant ordered to pay double costs and reasonable attorney fees to the government for a frivolous appeal); Cuartero v. United States AG, 2009 U.S. App.

LEXIS 1501 (2nd Cir. 2009) (imposing sanctions payable to the government for a frivolous appeal); In re Pers. Restraint of Bailey, 162 Wn. App. 215, 252 P.3d 924 (Wash. App. 2011) (State may recover attorney fees in collateral review proceeding); Walters v. Crowley, 1995 OK CR 53, 902 P.2d 1109 (Okla. Crim. App. 1995) (approving district court award of attorney's fees to the state for having to respond to a frivolous appeal).

More importantly, Petitioners' fears are baseless. The State did not ask for a monetary sanction against Petitioners in this matter. Petitioner has not identified a single case were the Clark County District Attorney's Office has ever requested the imposition of a monetary sanction against a defense attorney. Undersigned counsel has been with this Office for over twenty years and is not personally aware of any case where monetary sanctions were sought. The written policy of this Office requires that such a decision be made by the District Attorney or an Assistant District Attorney so it is unlikely that Judge Villani's order will open the flood gates of sanction litigation. Further, there is no financial incentive for prosecutors to pursue monetary sanctions. Prosecutors are paid a salary by the government that is not impacted by whether they successfully secure the imposition of financial sanctions on defense counsel. Further, the pursuit of sanctions does not make good financial sense. In this matter, Judge Villani imposed a $250 sanction payable to the State. Based upon the number of hours undersigned counsel has invested in just the

sanctions portion of this case, the Clark County District Attorney's Office has lost money in defending Judge Villani's order.

VIII. ASSIGNING THIS MATTER TO A DIFFERENT JUDGE IF REMANDED IS PREMATURE

Petitioners and EBaY complain that if this matter is remanded that this Court should summarily assign the case to any judicial officer other than Judge Villani because of alleged judicial bias. (Petition, p. 49-50; EBaY Brief, p. 18-23). However, Petitioners ignore the mandatory process for adjudicating a judicial bias claim. Lioce v. Cohen, 124 Nev. 1, 25 n.44, 174 P.3d 970, 985 n.44 (2008) ("Lioce argues that, should we decide a new trial is warranted, his case must be remanded to a different district court judge because Judge Bell was biased toward him. We conclude that this argument is without merit, and we also direct Lioce to NRS 1.235(1)."). As such, this Curt should decline to ignore the law and its own precedents.

NRS 1.235 and the Code of Judicial Conduct require that a party seeking recusal serve an affidavit supporting the request on the challenged judicial officer and that the judge be given an opportunity to submit to recusal or file an affidavit addressing the judicial bias concerns. NRS 1.235(1), (4), (5)(a)-(b); Towbin Dodge, LLC. v. Eighth Judicial District Court, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). The ability of the judicial officer facing disqualification or recusal to preserve a record is essential because "[a] judge's decision not to recuse himself

voluntarily is given 'substantial weight' and will be affirmed absent an abuse of discretion." Kirksey v. State, 112 Nev. 980, 1066, 923 P.2d 1102, 1118 (1997).

Even if this Court were to address recusal without allowing Judge Villani an opportunity to create a record, Petitioners fail to prove that recusal is warranted. It is Petitioners' burden to establish that Judge Villani "displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible'" or whether the record sets "forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality[.]" Towbin Dodge, 121 Nev. at 260, 112 P.3d at 1069; Walker v. State, 113 Nev. 853, 864, 944 P.2d 762, 769 (1997) (quoting, Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994)), cert. denied, 525 U.S. 950, 119 S.Ct. 377 (1998). A reviewing court should look for actual manifestations of bias on the part of the judicial officer. A Minor v. State, 86 Nev. 691, 695, 476 P.2d 11, 12 (1970). Ultimately, "any disqualification of a judge … because of bias … should be restricted to those cases where malice is obvious and there is little question that the judge or justice cannot be impartial." City of Las Vegas Redevelopment Agency v. Hecht, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997).

The public policy animating this Court's holding is that questions of disqualification and recusal must not become a banal struggle for tactical advantage:

> Our decision today is also in line with this court's previous concern about the disqualification of judges and justices because of a judge's bias against an attorney of record. In In re Petition to Recall Dunleavy, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988), we stated:
>
> > To permit an allegation of bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court. See State v. Rome, 235 Kan. 642, 685 P.2d 290, 295-96 (1984); see also Tyman v. United States, 376 F.2d 761 (D.C.Cir. 1967), cert. denied, 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d111.
>
> If we permitted FitzSimmons to disqualify Justice Rose every time she represented a party or associated to represent a party before the Nevada Supreme Court, she would have a potent weapon that would permit her to disqualify one justice of the court in any case. We are reluctant to extend this advantage to any party unless a clear, substantial showing of actual bias has been made establishing a judge's or justice's bias against a party's attorney.

Hecht, 113 Nev. at 650-51, 940 P.2d 138-39.

Petitioners demand for summary recusal by this Court without complying with the requirements of NRS 1.235, the Code of Judicial Conduct or this Court's precedents is in direct violation of Hecht because it is nothing more than a naked grab for advantage. Petitioners clearly believe that as the Federal Public Defender they are entitled to a judge who meekly submits to their flagrant and repeated violations of basic procedural rules. In their world, if a judge will not ignore their lack of respect for State procedural mandates that judge must obviously be against them. However, the record simply does not support such a distorted view of reality.

This record demonstrates that Judge Villani imposed a mere $250 sanction only after Petitioners twice failed to comply with mandatory procedural obligations requiring them to request permission before presenting arguments to the Court. NRS 34.750(5) required that Petitioners seek permission before filing an amended petition. DCR 13(7) and EDCR 7.12 mandated that Petitioners seek leave of court before seeking reconsideration. Judge Villani was clearly concerned that Petitioners accord Nevada courts the same level of respect that the Federal Public Defender regularly shows federal courts. 2 AA 358, 360, 362. Indeed, if Judge Villani were truly biased against Petitioners he would have accepted the State's request to find bad faith on their part. 1 AA 151; 2 AA 251. That Judge Villani ignored these invitations demonstrates that he was treating Petitioners fairly while firmly holding them accountable for their blatant and repeated failures to comply with basic procedural requirements.

CONCLUSION

WHEREFORE, the State respectfully requests that Petitioners demand for extraordinary relief be DENIED.

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/ / /

Dated this 21st day of December, 2017.

Respectfully submitted,

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BY */s/ 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 December 21, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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