IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents,

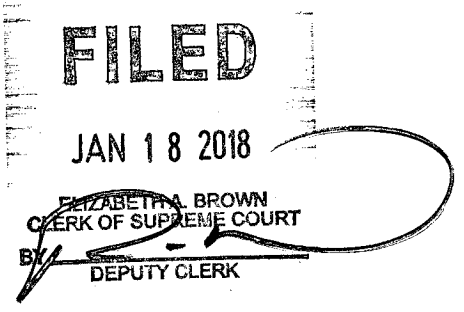
and

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

Real Parties in Interest.

Supreme Court Case No. 73462

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



REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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In this mandamus action, the petitioners are contesting sanctions that were imposed on defense attorneys for making a good-faith effort to vindicate the constitutional rights of a client who is challenging his death sentence. *See generally* Pet. for Writ of Mandamus, filed July 14, 2017 (hereinafter "Pet.").

Intent on defending the highly troubling sanctions that were levied below, the State, in its Answer to the Petition for Writ of Mandamus, filed December 21, 2017 ("Answer"), makes a number of false and misleading assertions. To correct them, the petitioners take up each in turn. After that, the petitioners address the irrelevant issues that the State has improperly attempted to interject in these proceedings even though they formed no part of the sanctions order, not to mention the fact that they are flatly contradicted by the record. Once the Court considers the sanctions in light of this clarified record, they are exposed as completely unjustified and dangerous to the fair administration of justice in Nevada.

I. THE STATE HAS NOT JUSTIFIED THE SANCTIONS

Although the State offers a variety of distracting commentaries on various subjects—mostly to express counsel's personal opinions about public defenders and the death penalty—it has little to say about the actual issue presented here for review: whether the district court's sanctions orders can be upheld. On that question, the district court offered two rationales for its sanctions: (1) that the petitioners filed a motion for leave to amend after such leave had already been

denied; and (2) that the petitioners included arguments about the reasonable-doubt standard in a pleading when the court believed such arguments were impermissible. *See* App. 475–76, 528–29. As the mandamus petition noted, it is not at all evident that the first rationale can be relied upon here as a basis for affirmance. *See* Pet. at 15–16. For that line of reasoning does not appear in the district court's final, signed order, which constitutes the formal judgment of the court. *See id.* That leaves only the second justification.

With respect to that justification, the State says absolutely nothing in its Answer. The lone reference in its brief to the phrase "reasonable doubt"—outside of its procedural history—is in a passing remark about the content of the original post-conviction petition. *See* Answer at 35. Nowhere does the State make a single point to suggest that the petitioners should somehow have realized that they were forbidden from making an *argument* about reasonable doubt in support of Claim One when the claim was by all accounts still in the petition and ripe for litigation. That is what the district court's final order punished the petitioners for doing. *See* App. 528–29. The mandamus petition explains at length why this basis for the sanctions was inappropriate, namely, because counsel were legitimately arguing reasonable doubt in furtherance of their appellate-reweighing claim, as they had every right to do, not in furtherance of the struck jury-weighing claim. *See* Pet. at 19–25.

There is no rebuttal to this explanation in the State's Answer. Presumably, then, even the State recognizes how untenable it is to sanction capital defense attorneys for invoking a plainly relevant constitutional argument in defense of a claim that they are actively litigating, simply because a *different* claim has been struck. The fact that the State's attorney cannot bring himself to defend the *sole* basis for the sanctions that is cited in the district court's final order is strong evidence that the order cannot stand.

Even though the petitioners believe the reasonable-doubt basis is the only one that can support the sanctions on appeal, as it is the only basis relied upon in the final order, they will in an abundance of caution address the other basis too, as they did in the mandamus petition. *See* Pet. at 19–25. That other basis is that the sanctions order was imposed because a motion for leave to amend the petition was filed after the amended petition had been struck. *See* App. 475–76.

Before delving into the details of the State's defense of this ruling, it is worth emphasizing what the State thinks the petitioners *ought* to have done, as it highlights the implausibility of its position and consequently of the sanctions. According to the State, the petitioners' motion for leave to amend was in effect a motion for reconsideration. *See* Answer at 36. Thus, the State continues, it was improper for the petitioners to seek "reconsideration of the decision to strike by requesting leave to amend without first requesting permission to pursue

reconsideration." *Id.* In other words, the petitioners were wrong to file a motion seeking leave to amend. What they had to do instead, posits the State, was file a motion seeking leave to seek leave to file a motion to amend. That sentence fairly sums up the Kafkaesque universe the district court and the State have thrown the petitioners into. The idea that one request for leave was not enough, and that there had to be two layers of permission, is farfetched. The idea that the petitioners can be sanctioned for not realizing in advance the existence of such an unusual rule is even more so. And the idea that they can be so sanctioned while challenging a client's death sentence, a situation in which sanctions are supposed to be imposed *most* cautiously, *see Young v. Ninth Jud. Dist. Ct.*, 107 Nev. 642, 649, 818 P.2d 844, 850 (1991) (per curiam), is insupportable.

When one considers in more depth the nature of the State's theory, it becomes even more fanciful. The State's premise is that the petitioners were functionally seeking reconsideration when they filed a motion for leave to amend, as amendment had already been denied. *See* Answer at 36. That premise is false. The district court had *not* denied leave to amend. Nor has the State pointed to any order indicating that it had. Rather, the State contends that when the amended petition was struck, counsel should somehow have understood that leave was denied, even though the order said nothing of the sort. *See* App. 439–42. The petitioners took the order at face value. It told them that the amended petition was

struck. It did not tell them that leave to amend had been denied. Nor had the judge made any such comment at the hearing on the motion to strike. *See* App. 353–71. The petitioners are not mind readers. They cannot reasonably be sanctioned for failing to know what was in the judge's head when he signed the order if that thought was never communicated to them.

It is especially offensive for the State to now insist that the strike order somehow silently reflected a decision denying leave to amend, and that the petitioners should somehow have intuited as much on pain of sanctions, when the State's actions at the time suggested the exact opposite. The State sought the strike order on the ground that the petitioners failed to seek leave before filing the amended petition. *See* App. 180–204. For that obligation, the State relied upon *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006), and NRS 34.750(5). *See* App. 198. Over the petitioners' objections, the district court agreed. In an order drafted by the State's attorney, the district court struck the petition and cited only those two authorities. *See* App. 439. There is not one word in the order indicating that leave to amend was denied. Thus, the State's calculated and aggressive litigation strategy created a situation in which counsel had every reason to believe their petition had been struck *because they had not sought leave to amend*, and no reason to believe such leave had already been denied.

Having been told by the district court, at the State's urging and in the State's own words, that their petition was struck because they had not sought leave, counsel did what any diligent attorney would have: they sought leave. In the process, they informed the district court and the State that they were doing so to rectify their earlier omission. *See* App. 373 ("On March 17, 2017, the Court struck the amended petition because Mr. Howard did not seek leave before filing it. Mr. Howard therefore seeks leave now."). It was only at that point, after the petitioners had done everything in their power to comply with the Court's order, that the goalposts suddenly moved and they were accused of asking for something that had already been denied.

In effect, the State is punishing the petitioners for doing exactly what the district court instructed them to do on the State's own motion. Under such circumstances, it is surprising that the State would repeatedly describe the *petitioners* as the ones engaging in "gamesmanship." Answer at 22, 25, 41. The State is upbraiding capital defense attorneys for gamesmanship after deliberately making it impossible for their client to simply obtain a *ruling* on a serious constitutional challenge to his death sentence, and then getting them sanctioned when they tried.

It is telling that the State has no real response to the dilemma that it thrust upon the petitioners. Rather, it concentrates on the fact that the petitioners *argued*

for amendment before the strike order, implying that because they made the argument they should have known it had been rejected. *See* Answer at 36. But the syllogism does not work. The dispositive fact is that the petitioners' argument for amendment was not *ruled upon* in the order or at the hearing. They had only those things to look at when deciphering what the district court had decided. And those things uniformly indicated that the petition had been struck for the sole reason that counsel had not sought leave to amend. *See* App. 353–71, 439. Given that basis for the order, how could the petitioners possibly have divined that they actually had been denied leave to amend? Such an interpretation would have made no sense. Why would the district court write that it was striking the petition for being filed without leave if it was actually ruling that leave was being denied? The two explanations are mutually exclusive. It is surely not sanctionable conduct to read an order as limited to its own straightforward language, rather than as containing a second, completely inconsistent ruling as well.

Although the State's opinion is that these issues are unrelated to the danger of chilling zealous capital defense, *see* Answer at 38–39, it is mistaken. In that regard, it is notable that the State ignores the duty of a capital defense attorney to exhaust viable constitutional claims in state court before presenting them in federal habeas proceedings. *See* Pet. at 27 (discussing that duty). Exhaustion means that the prisoner must give the state courts every possible opportunity to rule on the

claim. *See id.* Claims based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), as the ones here were, are obviously viable, for they have led to large numbers of death-row inmates obtaining relief, *see id.* at 27, and the State is not heard to disagree. The petitioners therefore had a duty to exhaust their *Hurst* claims.

Once this case is considered with the duty to exhaust in mind, it is clear that the State and the district court put the petitioners in an untenable position. They had a viable constitutional challenge to their client's death sentence in the form of Claim 2. When they attempted to raise that claim in an amended petition without seeking leave, as they reasonably believed was acceptable in the jurisdiction, *see infra* at 23–24, they were rebuffed by the State for not requesting permission, and their petition was struck on that ground. What were the petitioners supposed to do at that point? They knew that the State was of the view that leave was required. They naturally believed the court was of the view that no leave had been requested. They therefore reasonably assumed that exhaustion required a motion for leave. In the absence of such a motion, the State could easily have taken the position in federal court that Mr. Howard had not properly exhausted the claim.

If the sanctions are upheld, it would mean that the petitioners were in that moment forced to choose between their ethical duties to their client and their ethical duties to the courts. That is, the petitioners could have forsaken a motion to amend and given the State an open invitation to get their claim thrown out of

federal court. Or they could file a motion to amend and jeopardize their professional reputations. That is not a choice that should be imposed on attorneys, let alone attorneys who are striving to protect a client from execution.

A similar choice confronted the petitioners on the reasonable-doubt front. Claim Two had been struck, but they had an obligation to present Claim One in the best possible light. There were important arguments in support of Claim One that relied upon the reasonable-doubt standard. *See* Pet. at 9. So, if the sanctions were valid, the dilemma facing the petitioners was either to abandon colorable arguments in support of a constitutional claim for their death-sentenced client, or make the arguments and find their integrity impugned in the form of sanctions. To create such a dilemma, as was done below, is to greatly endanger the "vigorous, diligent advocacy demanded of defense counsel in representing capital defendants." *Young*, 107 Nev. at 648, 818 P.2d at 848, something this Court has strongly warned against.

In sum, the State has offered no persuasive defense for the sanctions, and they should be vacated.

II. THE PETITIONERS RECEIVED NO REAL NOTICE

To the State's mind, the petitioners received adequate notice of the sanctions, *see* Answer at 30–33, but its position depends entirely on revisionist history.

As an initial matter, it bears repeating that the sanctions orders are deserving of vacatur without any need for further proceedings on remand. *See* Pet. at 40, 45–46, 48–49. Lack of notice only confirms how flawed the process was below, and thus why vacatur is necessary.

The State's response on the notice front has two elements, one that distorts the facts and the other that distorts the law.

First, the State contends that the petitioners received adequate notice of the sanctions because of a proposed order emailed to them by counsel for the State. *See* Answer at 30–31. What the State has no answer to, however, is the fact that the proposed order was simply memorializing a ruling that the district court had already rendered. Specifically, it was on April 19, 2017, at 3:00 AM, that a journal entry was filed, in which the district court wrote: "It is FURTHER ORDERED that sanctions *are* imposed against Petitioner's counsel for attorney fees in the amount of $250.00 . . . ." (capitalization in original) (italics added). App. 475. It was only several weeks later, on May 10, 2017, that the proposed order was emailed to the petitioners. *See* App. 537. Simply put, when the proposed order was sent to the petitioners, the district court had already imposed the sanctions. Notice after the fact is no notice at all.

The State contends that the petitioners had notice because they could have objected to the proposed order, *see* Answer at 32, but concedes at the same time

that Nevada law imposes no such obligation, *see id.* (citing *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 692–93 (2007)), thereby cutting off its own argument at the knees.

More importantly, an opportunity to object to a proposed order for a ruling the judge had already reached was manifestly not an opportunity to be heard on the propriety of the sanctions, which is what the petitioners were entitled to. The *imposition* of sanctions was by then a fait accompli. As unambiguously noted in the very opinion cited by the State, the purpose of objections under such circumstances is merely "to ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings." *Byford*, 123 Nev. at 69, 156 P.3d at 692. It was not inaccurate for the proposed order to reflect that the petitioners were being sanctioned. The court had already made that abundantly clear. Getting one order telling you that you have been sanctioned, and then a second order confirming it, is an empty formality—it is not real notice.

Ironically, in an Answer that chides the petitioners for supposedly seeking reconsideration through the back door on amendment and reasonable doubt, *see* Answer at 36, the State simultaneously faults them for *not* doing exactly that with the proposed order. That is, an objection to a proposed order that substantively challenges the content of the order—which the district court had already signed off on—is indeed a motion for reconsideration masquerading as something else. Since

the State has throughout the life of this case taken every opportunity to fabricate procedural rules and then penalize the petitioners' death-row client for his attorneys' imaginary violations of them, one can only imagine how vigorously it would have assailed them for an actual violation. *See Howard v. Filson*, Nev. S. Ct., No. 73223 (hereinafter "PCR Appeal"), Oppo. to Mot. to File Ex., filed Oct. 12, 2017 (contesting Mr. Howard's request to file an exhibit on the grounds that it would take the brief above the word limit and that it was never presented to the district court, both of which were false); App. 151–52 (asking the district court to dismiss Claim One on the grounds that Mr. Howard failed to address why the petition was filed as late as it was, even though it clearly did); App. 180–203 (moving to strike Mr. Howard's amended petition on the ground that he was required to seek leave, unlike every other prisoner in the state).

The State's only other rejoinder on the notice question is to cite one case in which this Court purportedly imposed a sanction without notice or an opportunity to be heard. *See* Answer at 32–33 (citing *Greene v. State*, 113 Nev. 157, 931 P.2d 54 (1997)). But *Greene* contains no language about notice or an opportunity to be heard. By definition, then, it does not establish any precedent on the issue. In any event, an unconstitutional practice does not become less unconstitutional when a court inadvertently engages in it without analysis. The State does not offer a single reasoned authority explaining why it is lawful to sanction an attorney without any

notice or an opportunity to be heard. As a result, the State has nothing to counter the mountain of precedent presented by the petitioners, which includes binding law from the U.S. Supreme Court, *see Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2464 (1980), and which universally requires notice and an opportunity to be heard, *see* Pet. at 41–42.

In short, the State's argument on notice depends upon a mischaracterization of the record, a misunderstanding of Nevada law, and an unexplained resistance to a constitutional principle that has been universally adopted and applied by the highest court in the country. Its position is thoroughly unconvincing, and notice here must be found deficient.

III. THE JUDGE DID NOT PROPERLY JUSTIFY THE SANCTIONS

The mandamus petition set forth in detail why the sanctions were not adequately justified by the district court. *See* Pet. at 34–40. It explained that the justification was lacking in two regards: (1) it is not clear what conduct was actually sanctioned or why; and (2) it is not clear what authority the district court relied upon. *See id.* Other than the naked and unpersuasive assertion that the court's orders stand on their own, *see* Answer at 29, the State has no response to the first point.

On the question of what authority empowered the district court to sanction the petitioners, the State at least addresses the issue, but does so weakly. The

State's perspective is 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." *Id.* at 27–28. But the only two cases the State relies upon for this rule are both non-binding, *see id.* at 28–29 (citing two Ninth Circuit decisions), and inapposite.

In the two opinions, the sanctioned parties *were* given notice and an opportunity to be heard. *See Gyler v. Hampton*, 234 F. App'x 693, 694 (9th Cir. 2007) (per curiam); *Primus Automotive Fin. Servs.*, 115 F.3d 644, 647 (9th Cir. 1997). Relatedly, in both of those cases, it was apparent what conduct had led to the sanctions and why. *See Gyler*, 234 F. App'x at 694; *Primus*, 115 F.3d at 647.

In the case at bar, by contrast, the fact that the district court failed to reference any authority for the sanctions must be considered in tandem with the fact that the sanctions here were imposed sua sponte with no notice, no opportunity to be heard, and no meaningful explanation of why the sanctions were even warranted. *See generally* Pet. *If* there is a case in which a trial court can be presumed to have meted out sanctions under its inherent authority, it is certainly not this case. Here, Judge Villani was apparently unaware of the fundamental need for notice and an opportunity to be heard, as he sanctioned the petitioners before they had either. And here, the only "reasoned" explanation for the sanctions—if one can call it that—is that counsel ought to have known that when he told them

they had to seek leave to amend what he really meant was that they were forbidden from seeking leave to amend, and that counsel ought to have known that when he told them Claim Two was struck he really meant they were forbidden from saying anything about Claim *One* that reminded him of Claim Two. *See* App. 475–76, 528–29. Every piece of evidence militates in favor of the conclusion that the district court was unaware of the most basic requirements for imposing sanctions. To simply assume under such circumstances that the court grasped and yet refused for no apparent reason to articulate the basis for sanctions, despite the various and significantly differing authorities to choose from, *see* Pet. at 35–36 (listing six such authorities and examining the distinctions between them), is to indulge in a fantasy. Insofar as there might generally be a presumption that the district court knew the law, and insofar as that presumption is applicable in the unique context of capital defense, that presumption is easily overcome here by the court's egregiously unlawful actions.

With so little law behind it, the State falls back on its description of the unexplained practice of this Court. *See* Answer at 29. It asserts that this Court utilizes its inherent authority in the same manner that Judge Villani did. None of the cases referenced involved defense attorneys who were sanctioned while representing capital clients, *see id.*, so none carry the heightened *Young* standard. Additionally, there are special reasons why trial judges need to explain their

sanctions orders: so as to allow this Court to fully review their decisions. *See, e.g.*, *Hernandez v. State*, 124 Nev. 639, 649 n.25, 188 P.3d 1126, 1133 n.25 (2008) (discussing how "specific factual findings . . . enable adequate appellate review"). That reason does not apply here, where the Court is not subject to error-correction by any other tribunal.

To the extent the sanctions here are considered to have been justified at all, which is doubtful, the justification was woefully incomplete, and the State does not prove otherwise.

IV. THE STATE'S OTHER POINTS ARE IRRELEVANT AND FALSE

The sanctions can and should be vacated on the basis of the foregoing arguments. Those arguments address the only two grounds that were actually given by the district court, and they defeat the very few relevant assertions made in the State's answer.

Unfortunately, the State does not limit its Answer to the actual issues presented for review. Instead, it devotes large portions of its Answer to digressions on a number of other subjects that were not relied upon by the district court as the basis for sanctions. Of these digressions, the two that are emphasized the most by the State are (1) that the petitioners acted improperly by filing an amended petition without seeking leave; and (2) that counsel filed their post-conviction petition on

the eve of the deadline in order to delay a potential execution date. *See, e.g.*, Answer at 23–24.

Neither assertion is put forth as the reason for the sanctions in the district court's orders, which are the rulings under review here and thus the sole focus of these proceedings. The minute entry explains the sanctions as follows: "It is FURTHER ORDERED that sanctions are imposed against Petitioner's counsel for attorney fees in the amount of $250.00 in which the State incurred [sic] for having to respond to Petitioner's Additional Motion to Amend after this Court denied such on March 17, 2017 and prior leave was not obtained." App. 475–76. In other words, the court sanctioned the petitioners because it believed it had already denied leave to amend when they sought it. The district court did not purport to impose the sanctions because counsel had filed an amended petition without seeking leave, and it certainly did not purport to do so because it thought the petition was late or part of an attempt to delay an execution.

Nor does the final order say any such thing. It explains the sanctions thusly:

> By offering the same or similar burden of proof arguments against the jury's selection of death as were contained in the Amended Fifth Petition, both of these pleadings sought reconsideration of this Court's March 17, 2017, decision to strike the Amended Fifth Petition. Petitioner did not obtain leave of this Court to pursue reconsideration of the March 17, 2017, decision to strike the Amended Fifth Petition. The failure to do so violates Rule 13(7) of the District Court Rules of Nevada and Rule 7.12 of the Eighth Judicial District Court rules.

App. 528. This ruling does not indicate that counsel were sanctioned for filing an amended petition without leave or for engaging in delay.

Because these two arguments by the State were not offered as grounds for the sanctions by the district court, they cannot justify the sanctions now. *See Arab Am. Television v. Union of Radio & Television*, 152 F.3d 923, 1998 WL 416107, at *2 (9th Cir. June 17, 1998) (per curiam) ("AATV does not cite precedent authorizing an appellate court to impose sanctions on an alternative ground not relied on by the trial court, and we have found none."); *accord Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 831 (2d Cir. 1992); *Patel v. Crown Diamonds, Inc.*, 247 Cal. App. 4th 29, 41, 201 Cal. Rptr. 3d 593, 603 (Cal. Ct. App. 2016); *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1045–46, 821 N.E.2d 340, 354 (Ill. App. Ct. 2005).

Nevertheless, because the State stresses these issues in its Answer—and because the comments by the State's attorney on these subjects are false and inflammatory—the petitioners will address them to correct the State's misrepresentations and to ensure the Court has a full, true account before it when it resolves the issues in this important case.

A. Failing to Seek Leave Was Not Sanctionable

The State chides counsel for filing an amended post-conviction petition without first seeking leave, *see* Answer at 25, but to this day it has not

demonstrated that any such obligation existed. At a bare minimum, it has certainly not shown that such an obligation was so well-established that the petitioners could be *sanctioned* for not fulfilling it.

There are two authorities cited in the district court's order striking the petition—a statute and a case—but neither could in any reasonable universe support the sanctions.

Before showing why, the petitioners note that the following argument is adapted from the opening brief in their related appeal from the denial of post-conviction relief. *See* PCR Appeal, Aplt. Opening Br., filed Oct. 11, 2017 (hereinafter "AOB"), at 69–78. Although the petitioners are articulating the same theory here as they do in the post-conviction appeal, it is important to remember that even if the Court ultimately disagrees with them on the merits of their theory, the fact remains that they did nothing sanctionable. That is to say, even if the Court holds that they did have an obligation to seek leave to file an amended petition, they were quite obviously not acting in bad faith in the absence of law clearly prohibiting their approach and when everyone else was doing the exact same thing without protest from the State or the district court.[1]

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[1] This Court has denied without prejudice the petitioners' motion to consolidate the instant mandamus proceeding with the related post-conviction appeal. *See* Order, filed Oct. 12, 2017. Even so, the petitioners respectfully request that if oral argument is granted in both this case and the post-conviction case, the arguments be scheduled for the same day. That would minimize the time and expense for the

Turning now to the argument, and starting with the statute, the sanctions cannot be upheld on the basis of NRS 34.750, the statute cited by the district court when it struck the amended petition. *See* App. 439. By its clear terms, that provision deals with the situation in which a pro se petition is filed by the inmate, who is then appointed counsel by the state district court. *See generally* NRS 34.750. In the clause with the deadline that the district court below invoked, the statute provides: "*After appointment by the court,* counsel for the petitioner may file and serve supplemental[2] pleadings, exhibits, transcripts and documents within 30 days" from the date on which the Court has ordered an answer or appointed counsel. NRS 34.750(3) (emphasis added). Unlike the scenario contemplated by the straightforward language of this subsection, Mr. Howard did not file a pro se petition, and undersigned counsel were not appointed by the state district court. For the petitioners, there was simply no event that would have set the thirty-day period running. How could they possibly be expected to abide by a deadline that

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attorneys on both sides, and would be economical for the Court as well, since the issues in the two cases are inextricably intertwined. *Compare* Pet., *with* AOB.

[2] Some cases refer to "amended" petitions and others to "supplemental" petitions. The petitioners do not believe there is a distinction between the two that matters to the case at bar. *See Miles*, 120 Nev. at 387 & n.17, 91 P.3d at 590 & n.17 (using the words interchangeably). Unless quoting another source, the petitioners use "amended" to remain consistent with the nomenclature predominantly employed below and in this mandamus case.

did not appear to exist for them and that was literally impossible to calculate in their case?

Second, the district court used *Barnhart* to justify its strike order, *see* App. 439, but *Barnhart* actually cuts against sanctions. In that case, the prisoner filed a petition and, following that, an amended petition. *See Barnhart*, 122 Nev. at 303, 130 P.3d at 651. After a motion for partial dismissal was filed by the State, the district court held an evidentiary hearing on all the claims raised in the amended petition. *See id.* Only then, *at the evidentiary hearing*, did the petitioner's attorney try to raise an additional claim for the first time. *See id.* A cursory reading of the relevant passage from *Barnhart* is enough to refute the district court's view that it has anything to say about Mr. Howard's case:

> In the order resolving Barnhart's petition, the district court specifically noted that the claim regarding the coercion defense was not properly before the court *because it had not been pleaded in the petitions filed by Barnhart or her counsel*. We agree. Generally, the only issues that should be considered by the district court at an evidentiary hearing on a post-conviction habeas petition *are those which have been pleaded in the petition or a supplemental petition and those to which the State has had an opportunity to respond.* We further conclude, however, that the district court may exercise its discretion under certain circumstances to permit a petitioner *to assert claims not previously pleaded.*

Id. (emphases added). As the italicized text indicates, *Barnhart* was entirely about when, if at all, a petitioner can raise claims at an evidentiary hearing that were not in *any* petition, and to which the State had no opportunity to respond.

Needless to say, that was not the case here. Claim Two was in the amended petition, drafted simply and to the point. *See* App. 171–72. It was so exceedingly easy for the State to respond to the claim that it, in fact, *did respond* at length to much of the law underpinning it. Like Claim One, Claim Two flows from *Hurst* and relates to what facts must be found by a capital jury before a defendant can be sentenced to death. *See* App. 171–72. In its motion to dismiss the original petition, the State explored in great detail the law on that issue. *See* App. 144–59. Even in its motion to strike, the State continued to examine that law. *See* App. 198–202. The State would not have been disadvantaged in any meaningful way by having to respond to Claim Two, and *Barnhart*'s reasoning does not validate the district court's harsh and unnecessary decision to strike the amended petition, nor could it possibly validate the even harsher decision to sanction the petitioners.

In its Answer, the State adds a citation to *Miles v. State*, 120 Nev. 383, 385, 91 P.3d 588, 589 (2004) (per curiam), Answer at 37, but that case was not referred to by the strike order or by the sanctions orders, *see* App. 198, 475–76, 528–29, and therefore cannot support the sanctions now, *see supra* at 18. In any event, *Miles* is even farther afield, as the Court there *allowed* a prisoner to file an amended petition and the opinion says nothing about him seeking leave in advance. *See Miles*, 120 Nev. at 384–87, 91 P.3d at 588–90. *Miles* does not establish any holding that would have made the sanctions appropriate.

It is even more germane to the sanctions that the strike order had no foothold in the district court's practice. The petitioners were simply following an approach universally adopted by scores of identically situated litigants, and accepted over a long, uninterrupted period of time by the State and the district court. It is deeply concerning for the State to now suggest that the petitioners can be sanctioned for doing exactly what everyone else had always done.

In particular, the petitioners presented the lower court with a random sampling of ten Clark County district court capital cases that involved amended petitions for post-conviction relief. *See* App. 209 & n.2.[3] Not a single docket reflected the filing of a motion for leave to amend or a motion by the State to strike. *See* App. 209 & n.2. In every single one of them, the amended petition was simply filed, litigated by the State, and adjudicated by the court. *See* App. 209 & n.2. The cases cover a wide variety of circumstances. *See* App. 209 & n.2. They stretch from 1997 to 2013 and involve petitions filed in nine different years during that period. *See* App. 209 & n.2. Nine different judges presided. *See* App. 209 &

[3] The ten cases are all listed in the appendix on the page cited above. Throughout this litigation, neither the State nor the district court contested the petitioners' description of the procedural history of these cases. The description should therefore be accepted here. If the Court wishes to confirm the petitioners' characterization of the cases, it can pull their dockets up on the Eighth Judicial District Court Records Inquiry website. *See* https://www.clarkcountycourts.us/Anonymous/default.aspx. The method for assembling the random sample is detailed in the appendix. *See* App. 227.

n.3. At least six different prosecutors from the Clark County District Attorney's Office were involved, including the lawyer who represents the State here and did so below: Jonathan E. VanBoskerck. *See* App. 209–10 & n.4. Finally, the cases encompass a great many different procedural postures. *See* App. 210. One amended petition was filed twenty-two days from the filing of the original. *See* App. 210. Another was filed six months from that date. *See* App. 210. Some were filed before the State moved to dismiss the original petition. *See* App. 210. Some after. *See* App. 210. Several petitions were filed by attorneys who the district court appointed. *See* App. 210. Others were not. *See* App. 210. Basically, the sample covers every possible procedural permutation, and amendment was not requested, opposed, or denied in a single instance.[4] *See* App. 209 & n.2.

Judge Villani wrote in his minute order that he was "unclear as to whether or not" the research sample uncovered by the petitioners were "specifically referring to Department XVII or various judges in the Eighth Judicial District Court." App. 475. The petitioners are unsure why this point was unclear to him, as they cited the post-conviction actions that they had found to him by their case numbers. App.

[4] To the extent necessary, Mr. Howard requests that judicial notice be taken of the filings referred to above, which were all described to the district court at App. 209 n.2, as well as the proceedings in any other case that is relied upon herein. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (en banc) (taking judicial notice of court proceedings).

209 n.2. What is more, the petitioners listed the eight judges associated with those actions, which included Judge Villani himself. *See* App. 209 n.2. The idea that a judge can sanction attorneys for a practice that he himself had allowed in the past, along with numerous colleagues of his, without any explanation as to why it was suddenly an unacceptable approach, is patently unfair.

Judge Villani also suggested in his minute order that "each case stands on its own factual and procedural history, and, therefore, whether or not Department XVII has allowed supplemental Petitions in the past on unrelated cases is not a legal basis to violate the procedural rules in this case." App. 475. Since Judge Villani did not offer any explanation as to what was different in this case as opposed to other cases that would have created an obligation to seek leave that other litigants did not have, the petitioners strongly dispute his reasoning on his own terms. Indeed, to treat one litigant differently from everyone else for no apparent reason is directly contrary to the Equal Protection Clause, an authority that is presumably important enough to serve as a "legal basis" for a court not to radically depart from its practice and strike a post-conviction petition, in a capital case to boot. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000). Setting the propriety of *striking* to one side, it is unfathomable that capital defense attorneys could be *sanctioned* for doing the exact same thing

that numerous litigants had done before them with the acquiescence of the court and the State.

Judge Villani also noted in his sanctions order that the petitioners had acknowledged at the strike hearing that "rules are adhered to" in the federal courts where counsel practiced. App. 475. The State stresses the point in its Answer as well, noting that amendment has to be requested in federal court. *See* Answer at 36. To state the obvious, the petitioners were not sanctioned in federal court. In federal court, amended petitions are struck when no leave is sought. So far as counsel's diligent research disclosed, that was not the case in Clark County District Court, where amended petitions were routinely filed without leave as a matter of course. *See supra* at 23–24. Until the petition was struck, counsel had no basis for assuming that they were appearing in front of a state court judge who for some reason had taken it upon himself to emulate federal court practices that had virtually no precedent in his own court. The petitioners' obligation was to determine what methods were acceptable in the court in which they were appearing. They did so. It is surely improper to sanction the petitioners for not having a crystal ball at their disposal to let them know that a practice universally accepted by the court before would suddenly become an act of *misconduct* as soon as they adopted it.

In addition to researching dockets, the petitioners reached out to several Nevada attorneys who had experience in post-conviction litigation. *See* App. 227. They were eventually able to speak with one, who told the petitioners that no leave was necessary and advised them to simply file the amended petition. *See* App. 227. The petitioners conducted a great deal of due diligence, and they were reasonably relying upon their own research results and the counsel they got from local practitioners. That is about as far from bad faith as one can be, and cannot possibly be sanctionable.

Oddly, the State suggests that the petitioners had an obligation to contact one particular organization as part of their research: the Nevada Federal Defender's Office. *See* Answer at 37. In light of the State's diatribes about collusion between different Federal Defender offices, *see* Answer at 23–24, 33–34, there is room to doubt the sincerity of that suggestion. More to the point, the petitioners' duty was simply to research the issue, and that is what they did. They had no duty to call the one person the State feels they ought to have. And since the two cases the State has pointed to as support for its rule does not in fact corroborate it, *see supra* at 21–22, there is no reason to suppose that a call to the single attorney proposed by the State would have changed the calculus.

In overview, the petitioners followed a convention overwhelmingly practiced in the Eighth Judicial Circuit, historically accepted by both the State and

the district court, and suggested by the attorney they consulted. To be sanctioned under such circumstances is bewildering and raises serious questions about the integrity of the proceedings below.

It is instructive that in Mr. Howard's own case, his previous attorneys had repeatedly filed amended petitions without seeking leave, *see* App. 210, without any protest from the State or the district court. In his third post-conviction action, Mr. Howard filed his petition on December 20, 2002, *see* Pet. for Writ of Habeas Corpus, filed Dec. 20, 2002,[5] the State moved to dismiss on March 4, 2003, *see* State's Notice of Mot. and Mot. to Dismiss Defendant's Pet. for Writ of Habeas Corpus, filed Mar. 4, 2003, and Mr. Howard amended the petition on August 20, 2003, exactly eight months after the original petition was filed, *see* Am. Pet. for Writ of Habeas Corpus, filed Aug. 20, 2003. No motion for leave to amend was filed, no motion to strike was filed, and the amended petition was resolved without difficulty by the courts. *See* Trans. of Proceedings, Oct. 2, 2003. In Mr. Howard's fourth post-conviction action, he filed his petition on October 25, 2007, *see* Pet. for Writ of Habeas Corpus, filed Oct. 25, 2007, the State moved to dismiss it on April

[5] To the extent necessary, the petitioners ask the Court to take judicial notice of all of the documents previously lodged here in Mr. Howard's previous appeals and referred to in this brief. *See Mack*, 125 Nev. at 91, 206 P.3d at 106. The procedural history outlined in the paragraph above can also be found by pulling up Mr. Howard's docket on the Eighth Judicial District Court Records Inquiry website. *See* https://www.clarkcountycourts.us/Anonymous/default.aspx.

8, 2008, *see* State's Notice of Mot. and Mot. to Dismiss Defendant's Pet. for Writ of Habeas Corpus, filed Apr. 4, 2008, and Mr. Howard amended the petition on February 24, 2009, sixteen months after the original petition was filed, *see* Am. Pet, for Writ of Habeas Corpus, filed Feb. 24, 2009. Again, no motion for leave to amend was filed, no motion to strike was filed, and the amended petition was resolved without difficulty. *See* Findings of Fact, Conclusions of Law and Order, filed Nov. 6, 2010, at 23.

In the proceedings below, when an amended petition was filed a mere two months after the original, the court proceeded in a manner entirely inconsistent with many years of history, as well as with the protocol that was followed in Mr. Howard's previous post-conviction actions. The petitioners were essentially lulled into the belief that they were taking the expected course, and then abruptly sanctioned for doing precisely what their predecessors had done.

In the year of litigation on this issue that has been needlessly conducted after the State and the district court decided without explanation to abandon their customary approach to amended post-conviction petitions, the State has been able to come up with a single prior case to justify its about-face: *Adams v. State*, Clark Cnty. Dist. Ct., No. 85C069704. *See* App. 248; Answer at 37. As an initial matter, even if this single case stood for the asserted proposition—which it does not—the fact that a lone proceeding involved a similar move by the State would be neither

here nor there. If a *random* sample of ten cases shows one convention, and a single case plucked out of obscurity by the State shows the opposite, the petitioners can hardly be faulted to choosing the former. How could they even be expected to find a particular district court docket, as opposed to the random sample they did find? And if they even could be blamed for not finding that one docket in the haystack, how were they to know that the one case somehow established the rule that would be followed, while the numerous others were somehow the exception? If anything, the fact that the State has only a single docket to cite to for its position is an indication that the petitioners were acting well within the mainstream and should not have been sanctioned.

In any event, *Adams*, too, is inapposite on its face. The State relied on two orders from the *Adams* case, one from 2015 and one from 2016. In the 2015 order, an amended petition was struck from the record because the petition had "already been ruled on; therefore, there was no pleading properly before this Court to be supplemented, as the Court did not grant leave for reconsideration, nor was there any order for the filing of supplemental pleadings." *See* App. 257. This was simply not the case for Mr. Howard, whose petition for post-conviction relief had *yet to be ruled on.*

The 2016 *Adams* order is equally irrelevant. There, the court struck claims *two through ten* from the petition. *See* App. 261. Had the critical issue been Mr.

Adams' failure to request leave in advance, Judge Earley would presumably have struck *all* new claims, not just a portion. Furthermore, the order itself reflects that Mr. Adams *did* file a motion for leave to amend his petition. *See* App. 260. Consequently, it is hard to imagine that his amended petition was struck for failure to ask permission.

The State's opinion is apparently that the petitioners can be sanctioned for trusting the dockets of ten random cases, the procedural history of their own case, and the advice of a knowledgeable local practitioner, instead of: (1) finding one other docket; (2) reading that one docket between the lines for a hidden meaning that is inconsistent with the most natural interpretation; and then (3) assuming that the hidden meaning of the single case outweighed the obvious meaning of the ten others, which included cases in which Mr. VanBoskerck and Judge Villani were themselves involved. To even state the opinion is to see its disconnect from reality.

Below, the State conceded that it "exercises discretion" in determining when to challenge an amended petition filed without leave. App. 248. "Generally," the State wrote, it would "not move to strike without real provocation." App. 248. The real provocation here, according to the State, consisted of the petitioners' participation in a nationwide conspiracy with other Federal Defender offices to engage in "*Hurst* skullduggery" as part of "a larger intentional attempt to delay

capital habeas litigation." App. 248. On top of the fact that the State's remarks about the Federal Defender offices are outlandish and baseless, *see infra* at 39–40, the problem for the State's theory is that it does not square with the straightforward chronology of the case. Counsel filed their amended petition on December 1, 2016. *See* App. 164–75. Every single one of the petitions cited by the State as evidence of the nefarious scheme it detects was filed *more than a month later*. *See* App. 248–49. Reduced to its essence, the State's attitude is that when the petitioners filed their pleading they were engaging in misconduct because of seventeen petitions that were filed by other attorneys, in other cases, weeks later. The word "frivolous" cannot do such an argument justice. No diversions by the State, no matter how aggressively they are pushed, can obscure what really happened here: a prosecutor exercised his discretion in an unprecedented and patently arbitrary manner to prevent a death-row inmate from getting his day in court on a significant constitutional claim. What is worse, the district court went along with him.

In overview, if counsel were sanctioned for filing an amended petition without seeking leave, they were sanctioned for doing something that they found through diligent research to be the accepted practice in the district court and tolerated by the judge and the prosecutor alike, including in the very case they were working on. The petitioners' conduct is the epitome of good faith and there

is not one shred of evidence in the record to suggest otherwise. If they can be sanctioned under such circumstances, any attorney can be sanctioned by any district court whenever the judge happens to disagree with their argument, no matter how novel and unprecedented the judge's position is. That cannot possibly be the law.

B. The Petitioners Did Not Engage In Delay

As it has throughout the lifespan of this case, the State continues to falsely castigate the petitioners for engaging in delay despite the demonstrated fact that they have been diligent and have done everything possible to resolve the case as quickly as possible.

Preliminarily, the petitioners reiterate that the district court did not find—or even refer to—any delay in its sanctions orders. *See* App. 475–76, 528–29. Undeterred by that fact, the State emphasizes the fictional delay in its Answer. *See* Answer at 42. The petitioners object to this improper argument, which is an attempt by the State's attorney to insert his own unfounded and incendiary opinions into the analysis. However, because the State has muddied the waters with this issue, and because its assertions on the matter are contradicted by every single piece of evidence in the record, the petitioners will address the question.

There are three "factual" predicates to the State's argument on this front, if one can call them that: (1) that Mr. Howard's post-conviction petition was

submitted on "the eve of the filing deadline," *see* Answer at 42; (2) that the petitioners are trying to push back a potential execution date for their client, *see id.*; and (3) that the petitioners were embroiled in a villainous plan hatched by a nationwide consortium of Federal Defender offices, *see id.* at 23–24. All three premises are untrue.

The one-year deadline that the petitioners supposedly filed on the eve of was January 12, 2017. *See Wilson v. State*, 127 Nev. 740, 744, 267 P.3d 58, 60 (2011) (en banc) (concluding that a petition based on a new opinion is due a year from its release); *Hurst*, 136 S. Ct. 616 (issuing on January 12, 2016); App. 27 (relying upon *Hurst* in the petition).[6] The petitioners filed on October 5, 2016, more than three months early. *See* App. 22. It is baffling that the State continues to allege that the petitioners waited "until the eve of the one-year time bar," Answer at 25, when the briefest look at the record would disabuse its attorney of his misconception.

In addition, the petitioners only took until October 2016 because they had to take care of necessary administrative tasks before appearing in state court. As the

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[6] This argument does not depend upon the Court agreeing with the petitioners that *Hurst* triggered their clock, as opposed to earlier decisions. Instead, the argument is responsive to the *State's* theory of misconduct, which revolves around the false notion that the petitioners filed right before the one-year deadline for *Hurst* petitions. *See* Answer at 23 (asserting that a number of petitioners "engaged in a pattern of waiting until just before the one-year deadline of NRS 34.726(1) to file *Hurst* claims" and then citing petitions filed in December 2016 and January 2017).

petitioners established in a sworn, uncontroverted declaration, it was in July 2016—about six months before the deadline—that they requested permission to pursue a state post-conviction action from the federal judge presiding over Mr. Howard's habeas case, as they were required by the U.S. Courts to do. *See* App. 424. Permission was not granted until September 13, 2016, at which point the petitioners had to find local counsel, prepare their pro hac vice materials, and then draft and file the pleading on October 5, 2016, less than a month after they were authorized to do so. *See id.* If it is improper for attorneys to seek permission to litigate an action six months ahead of the deadline and then file as soon as permission is granted, one has to wonder what percentage of attorneys are not engaging in misconduct.

Moreover, even if the petitioners *had* waited until the eve of the deadline—which they did not—such an approach is equally not improper. The purpose of a deadline is, of course, to set a date *after which* the attorney is not supposed to file. It has never been apparent to the petitioners why the State feels they had some duty to file early, as the State has never explained where such a duty might come from. If there is an obligation to always file at some unspecified point before every deadline, as the State's position implies, practically the entire bar would need to be sanctioned. As a perfect example, consider the State's own Answer here, which was filed *on the day of the deadline*. *Compare* Answer (reflecting a filing date of

December 21, 2017), *with* Order, filed Dec. 1, 2017 (directing Mr. VanBoskerck to submit an answer by December 21, 2017). It is difficult to overstate the irony of Mr. VanBoskerck's decision to attack the petitioners for filing on the eve of a deadline (when they filed three months early) in a pleading that was itself filed on the very day it was due. The State's own actions reveal how vacuous its criticism is.

The second falsehood at the root of the State's delay theory is related. To the State's mind, the reason the petitioners waited until the eve of the deadline (by filing three months early) was to push back a potential execution date. *See* Answer at 42. While citing other cases involving other inmates and other attorneys that discuss the possibility of delay, *see id.*, the State has never said a word about how this litigation would delay an execution *here*. That is because it would not. As the petitioners informed the State below, *see, e.g.*, App. 378, they did not request a stay in federal court for these proceedings, and it is the conclusion of the habeas case that would allow the State to set a meaningful execution date. *See McFarland v. Scott*, 512 U.S. 849, 858, 114 S. Ct. 2568, 2573 (1994). To this day, the petitioners have not sought a stay in the federal habeas case. *See Howard v. Filson*, D. Nev., No. 2:93-cv-1209. Quite to the contrary, they have been actively litigating the federal case simultaneously with this one. *See* App. 424. Since the current state post-conviction action began, the petitioners have filed several major

pleadings in federal court, including a 190-page brief on March 31, 2017 and a ninety-one page brief on September 5, 2017. *See id.*

The petitioners have spent tremendous amounts of time advocating for Mr. Howard in both state and federal court while the current post-conviction petition has worked its way here. They have done so because Mr. Howard has a strong personal interest in seeing his constitutional rights adjudicated as quickly as they possibly can be. In furtherance of that goal, the petitioners have not requested a single extension of a single deadline in this post-conviction action.

It is yet another irony that the only party in the post-conviction case who *has* sought an extension is the State. It recently asked for an additional sixty days to file its response brief (in another pleading that was, notably, filed on the eve of a deadline) because (1) this two-claim case was too complicated for the State's attorney, who has been on the case from the outset and is involved in several other *Hurst* matters, and (2) the State has delegated the drafting of its principal pleading in this capital appeal to a "law clerk," and considers its "goal" in the construction of that brief to be "as much about" "mentoring" as it is about litigating the constitutionality of Mr. Howard's death sentence. *See* PCR Appeal, Mot. for Enlargement, filed Nov. 13, 2017; Oppo. to Mot. for Enlargement of Time, filed Nov. 16, 2017 ("EOT Oppo."), and sources cited therein; Reply in Supp. of Mot. for Enlargement, filed Nov. 16, 2017, at 2. Because Mr. Howard desires

expeditiousness, he opposed the State's extension, *see* EOT Oppo., i.e., he opposed the delay the *State* was creating in his appeal. Other delays in the district court are attributable to the State's vexatious litigation, including its decision to file a motion to strike that apparently had no basis in its own practice rather than simply moving to dismiss Mr. Howard's amended petition, as it had done in every other case and as it easily could have done here if it wanted the same prompt resolution that Mr. Howard does.

Given the petitioners' demonstrated desire to move this case along as quickly as possible, the fact that it has not postponed an execution date whatsoever, and the fact that it is the State itself that has been the only party to delay the case, it is extraordinary for the State to suggest the petitioners can be sanctioned on the basis of delay.

The State's final misrepresentation is the most perplexing of all, but also the one its attorney appears to feel the most passion for. That is the evil plotting between different federal defender offices that he detects and—at great length—condemns. *See, e.g.*, Answer at 23–24, 33–34.[7] Mr. VanBoskerck's indictment of

[7] Mr. VanBoskerck defends his assault on the Federal Defender offices with a block quote that he cites to the appendix. *See* Answer at 23–24. That is a strange way to present this material, as it suggests the language was written by someone else, presumably the district court. In actuality, the passage was composed by Mr. VanBoskerck himself. *See* App. 460–62. It is perhaps understandable that Mr. VanBoskerck confuses his own work for that of the judge, since the district court adopted his lengthy proposed order three days after it was presented and without

the federal defender offices as a whole is shocking. Such a broadside against public defender agencies, in a case where the district court made no findings on the subject, and by a senior member of a prosecutorial entity, is exceptionally inappropriate. Given the appearance of impropriety that is created as a result, the Court may wish to admonish Mr. VanBoskerck not to engage in such unprofessional behavior in the future.

Nevertheless, because the State persists in disparaging all ninety-one federal defender offices in the country, and the hundreds of people they employ nationwide, the petitioners will reluctantly respond to correct the record.

First, the Federal Defender Services of Idaho do not work in concert with any other Federal Defender offices. Their sole loyalty is to their clients. They are not accountable for litigation decisions made by any other Federal Defender attorneys, just as Mr. VanBoskerck is not accountable for litigation decisions made by lawyers in every other prosecutor's office in the country.

Second, although it is rather incredible that they have to say so, the petitioners did not litigate this action as part of some conspiracy with other Federal Defender offices. As they set forth in a sworn declaration, the petitioners "were

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correcting the numerous errors therein, *compare* App. 478–507, *with* App. 508–38; *see* AOB, at 80 n.20 (listing some of the myriad typos in the order), but in the interest of clarifying the record the petitioners note that this particular document was never endorsed by the court.

concerned only about the rights of [their] client, Samuel Howard, and not about any other death row inmates represented by any other Federal Defender offices." App. 424–25. Recall as well that the petition was filed three months before those of the other offices, *see* Answer at 23–24, 33–34, throwing even more cold water on the State's overheated imagination.

Third, even if the petitions could be lumped together, the fact of their filing reflects *good* lawyering, not bad faith. *Hurst* is a significant new case that has allowed large numbers of death row inmates to get relief. *See* Pet. at 26–27. The Federal Defender offices who filed *Hurst* petitions had a duty to do their utmost to capitalize on the case for their clients. *See id.* at 26. It would have been negligent of them *not* to file. To use the filings as a basis for an accusation of misconduct, as the State recklessly does, is therefore to attack public defense itself. That is a dangerous road for a senior prosecutor to go down, and one that is unbecoming to his office.

Fourth, although the State ignores the fact to focus on its Federal Defender hysteria, the petitioners are not all Federal Defender attorneys. One of them, Paola Armeni, is an attorney in a private firm who is serving as local counsel in a pro bono capacity. If the Court permits senior prosecutors to slander attorneys for working alongside public defenders to provide much-needed legal services, and

then upholds sanctions imposed upon them, it will seriously deter such attorneys from volunteering their time in the future.

Mr. VanBoskerck's tribal-war approach to this case is illustrated nicely by how he deals with the problems his own office caused at sentencing. Interestingly, while blaming the petitioners for supposed misbehavior in other cases, engaged in by totally different offices, Mr. VanBoskerck minimizes misbehavior committed by his own office in this very case. In its background section, which curiously accounts for a fifth of its Answer despite the relatively narrow set of facts relevant here, the State acknowledges that one of the Clark County prosecutors who handled the Howard trial—Dan Seaton—was found by this Court to have committed misconduct. *See* Answer at 8–9.[8] Sixteen years later, the State attempts to explain away Mr. Seaton's egregious remarks at sentencing as acceptable on the basis that they were only rendered unlawful by subsequent authority. *See id.* at 9 nn.2–3. That explanation is tenuous, given that the rule of law transgressed by Mr. Seaton—that prosecutors are not to interject their "personal beliefs into the argument"—dates back a hundred years. *See Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (sampling the enormous

[8] In its pleading, the State quotes the language at issue above from the district court's final order. *See* Answer at 15. However, the language first appeared in a previous district court filing by the State. *See* State's Mot. to Dismiss, filed June 5, 2008, at 11 nn.7–8.

body of precedent behind the rule). Incidentally, when Mr. Seaton was referred to the Bar for potential disciplinary action by this Court, it was not just for his inflammatory speeches in *Howard*, but as a result of his "persistent disregard for established rules of professional conduct," for which he had been repeatedly admonished by the court, *see Howard v. State*, 106 Nev. 713, 722 n.1, 800 P.2d 175, 180 n.1 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.2d 420, 432 (2000), another fact that goes unmentioned by the State.

Mr. Seaton's misconduct, despite the State's ongoing attempt to whitewash it, is a good example of what sort of behavior actually warrants sanctions. It stands in stark contrast to the actions that the State is calling sanctionable here, which include filing a petition three months early, mysteriously creating delay despite never asking for a stay or an extension, and having the nerve to challenge a death sentence based on an important new case when other public defender agencies are also fulfilling their responsibilities and doing the same thing.

The State's scorched-earth method to this case is perhaps symptomatic of an office that prioritizes the obtaining and affirming of death sentences above its own duties of honesty and fair play. A recent report found that since 2006, this Court has found prosecutorial misconduct, remarkably, in nearly *half* of the capital cases arising from Clark County. The report observed that this was the highest ratio of "inappropriate behavior" that they had found while looking at the sixteen counties

that impose the most death sentences in the country. Fair Punishment Project, *Too Broken to Fix: Part I, An In-depth Look at America's Outlier Death Penalty Counties*, Aug. 2017, available at https://perma.cc/5S4G-CHL2.[9] It may regrettably be necessary for the Court to remind the State here that its first priority should be to see that "justice is done its citizens in the courts," *Brady v. Maryland*, 83 S. Ct. 1194, 1197, 373 U.S. 83, 88 (1963) (internal quotation marks omitted), not to win at any cost.

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

Overlooking the profoundly troubling actions of the district court on the sanctions issue, the State resists reassignment to a different judge in the event of a remand. *See* Answer at 45–48. The State is misguided, both legally and factually.

Legally, the State posits that reassignment is not allowed because the petitioners have not followed the procedure for pursuing disqualification of Judge Villani in the district court. *See id.* at 45–46. That is an odd argument, as the petitioners had no reason to believe Judge Villani needed to be recused until he sua sponte sanctioned them without any notice or an opportunity to be heard, which is the reason they are here now. At what point should they have sought recusal? By

[9] The website perma.cc allows the user to freeze a website for perpetuity in its present version with a constant address. The petitioners employ the service here to guarantee that the cited websites are not altered or destroyed during the litigation.

the time they had been treated with such blatant unfairness the case was already over.

The State's sole authority for this proposition does not provide it the assistance it needs. In the cited case, *see* Answer at 45, this Court simply declined to reassign a case on remand under the particular circumstances presented there, and reminded the litigant that he could seek disqualification below. *See Lioce v. Cohen*, 124 Nev. 1, 25 n.44, 174 P.3d 970, 985 n.44 (2008). That in no way means that a party can *never* obtain reassignment. As it happens, in the wake of *Lioce* the Nevada appellate courts continue to reassign remands to different trial judges. *See Matter of Huddle*, No. 70074, 399 P.3d 331, 2017 WL 2813955, at *2 (Nev. June 27, 2017) (unpublished disposition) (per curiam). In other cases, the Court declines to reassign but clearly does so on the assumption that it has the power and is simply choosing not to exercise it. *See, e.g., Rish v. Simao*, 132 Nev. Adv. Op. 17, 368 P.3d 1203, 1212 n.7 (2016). The State's attempt to diminish the power of this Court can be easily turned aside.

Because it is focused on the wrong area of law—that of recusal rather than reassignment—the State proceeds to apply the wrong standard. It recites the disqualification standard, *see* Answer at 46, but that is incorrect. The test for when reassignment on remand is called for is simply whether a refusal to do so will

cause the "appearance of impropriety." *Fisher v. Fisher*, 99 Nev. 762, 765, 670 P.2d 572, 574 (1983) (per curiam).[10]

The test is satisfied here. Below, the judge sua sponte imposed sanctions on capital defense attorneys for filing a motion he required them to file and then for making an argument in support of a claim he required them to litigate, all while providing no notice, no opportunity to be heard, and no meaningful defense of his order. An objective observer would have strong doubts about the petitioners' chances of obtaining a fair hearing before such a judge on remand.

The doubts are made stronger by Judge Villani's record in another recent capital case. In that case, a defense attorney attempted to raise objections to a Clark County prosecutor's questionable use of peremptory challenges against African American veniremembers. *See McCarty v. State*, 132 Nev. Adv. Op. 20, 371 P.3d 1002, 1007 (Nev. 2016). Before the attorney could make his record and obtain a reasoned ruling on his objections, Judge Villani "interrupted defense counsel" and told him that he had already ruled. *Id.* This Court reversed, finding that Judge Villani "clearly erred" and noted specifically that it was "troubled by" how he dealt with the matter, since he "prevented [the] attorney from continuing with his argument." *Id.* at 1007, 1009. Judge Villani's actions in *McCarty* are

[10] If the Court applies a higher standard, the petitioners argue in the alternative that it is satisfied for the reasons set forth here and in the mandamus petition.

strikingly similar to the ones he took here. In both cases, he sua sponte ruled against capital defense attorneys while preventing them from stating their position or contesting his ruling. That pattern suggests an unwillingness to give capital defense attorneys the impartiality they are entitled to, and it further supports reassignment.

The State disagrees, avowing with its usual hyperbole that the petitioners are attempting "a naked grab for advantage." Answer at 47. In the State's view, the 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." *Id.* Although the petitioners are flattered that the State believes they could possess such confidence, it is unfortunately mistaken. The petitioners have never encountered a judge "who meekly submits" to them, *id.*, and do not believe there are any judges—state or federal—who are so intimidated by public defense attorneys. Nor are the petitioners asking for meek submission. They are asking merely for a fair shake. It is especially astonishing that the State would accuse counsel of demanding preferential treatment while at the same time suggesting that they be sanctioned for filing an amended petition without leave, as nearly everyone else had always done without objection by the State or the district court. Stated differently, the petitioners are literally asking only that they be given the same treatment as their peers and predecessors: a chance to litigate their claims.

It is the State that is arguing not only that the petitioners be prevented from obtaining that equal treatment, but that they be *sanctioned* for expecting it. The idea that the petitioners are the ones calling for an exception to be made to the normal rules for their own partisan benefit is laughable.

The petitioners were simply doing their best to exhaust the claims they had, raising one and, when they discovered another, raising it in the manner their research suggested to them. When they were told to seek leave to amend, they did so. When they were told to brief Claim One, they made the strongest arguments they could in support, including that of reasonable doubt. All of these efforts were made in a good-faith endeavor to comply with the district court's rulings while fulfilling the ethical duties they owe to their death-sentenced client.

It is shocking that the State would suggest that the petitioners are now angling for an advantage. The petitioners did not ask to be here. They had no desire to spend large numbers of hours fighting sanctions orders that they would otherwise have spent in trying to protect their capital clients from being executed, as they would greatly prefer.

In considering the State's description of the petitioners as manipulative bullies, the Court may wish to consider the full evolution of the case below. Mr. Howard is a death-row inmate and the petitioners are his advocates. By contrast, Mr. VanBoskerck is a senior member of a large prosecutorial office that is trying

its best to kill him. In that capacity, Mr. VanBoskerck accused the petitioners of misconduct in nearly every single pleading he filed in this case, including his very first one, where he somehow divined, on the basis of a ten-page petition, consisting mostly of boilerplate and asserting a straightforward, legalistic challenge to a death sentence, that the petitioners were engaged in "skullduggery," and then proceeded to impugn the integrity of the entire Federal Defender community, whose sole mission is to represent poor men and women charged with committing crimes. *See* App. 151–52. After that, Mr. VanBoskerck accused the petitioners of "skullduggery" *six* more times, as they sought to comply with his—and the district court's—ever-changing definition of their procedural obligations, which bore no connection to any language in any orders or any prior practice by the court. *See* App. 248, 322, 456, 458, 463; Oppo. Mot. to Consolidate, filed July 18, 2017, at 7. Having listened for months to Mr. VanBoskerck's invective against the petitioners, and anyone who happened to share their job title, the district court eventually sanctioned the petitioners without any notice, and then promptly signed on a Monday a thirty-one page proposed order drafted entirely by the State three days after it was presented the previous Friday. *Compare* App. 478–507, *with* App. 508–38.

With those facts in mind, if there is a party here who expected the district court to acquiesce and encourage improper behavior—and got that acquiescence—

that party is not the petitioners. They ask only for a fair process and a neutral decision-maker, so that they can exhaust the constitutional challenges they have to their client's death sentence. The petitioners never asked for special treatment. They asked to be treated like every other litigant, many of whom did exactly what the State is now claiming the petitioners were sanctioned for. If the district court had simply denied relief on the petitioners' claims for the reasons it later cited, the petitioners would have respected that ruling and appealed, as they fully expected to do. The judicial system would then have been working as it is supposed to work. Instead, the district court imposed completely unjustified sanctions in a completely unjustified manner, creating a substantial amount of needless litigation. Reassignment is therefore merited.

V. CONCLUSION

In this strange and troubling case, two public defenders and one pro bono attorney were sua sponte sanctioned without notice for following their ethical duty to zealously represent a death-row inmate. If such sanctions are upheld, it will send a crystal-clear message to every capital defense attorney in Nevada: you have to choose between your reputation and your client. The petitioners are confident the Court does not wish to convey that message, and they ask for vacatur of the sanctions or—in the alternative—a remand for further proceedings before a new, unbiased judge.

DATED this 3rd day of January 2018.

GENTILE CRISTALLI
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VERIFICATION

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

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

2. I verify that I have read the foregoing Reply and that the same is true to my own knowledge, except those matters stated on information and belief, and as to those matters, I believe them to be true.

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

This declaration is executed on the 3rd day of January 2018 in Boise, Idaho.

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

CERTIFICATE OF COMPLIANCE

We hereby certify that this reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the reply has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. We do not believe that any word limit applies to the pleading because the Nevada Rules of Appellate Procedure impose no word limit on replies in support of petitions for mandamus. If any word limit does apply, it should be NRAP 32(a)(7)(B)(ii), since this is a capital case. In the event that rule controls, the reply is 12,913 words, *see* NRAP 32(a)(7)(C), within the 18,500-word limit set by the provision.

We further certify that we have read this reply and that it complies with NRAP 21.

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

accompanying reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of January 2018.

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on January 3rd, 2018. Electronic service of the document shall be made in accordance with the Master Service List to:

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In addition, I mailed the foregoing document to:

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