IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN PORTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80738

RESPONDENT'S ANSWERING BRIEF

Appeal From District Court's Denial of Postconviction Petition for Writ of Habeas Corpus Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(3) because it is a postconviction appeal that involves a challenge to a judgment of conviction for a category A felony.

STATEMENT OF THE ISSUE

1. Whether the district court did not err by dismissing Appellant's petition without conducting an evidentiary hearing.

STATEMENT OF THE CASE

On April 26, 2001, Appellant Justin Porter (hereinafter, "Appellant") was charged by way of Information with over forty (40) felonies, including sexual assault, kidnapping, murder, burglary, and robbery, related to nine (9) events over a

four (4)-month period, involving twelve (12) victims. Appellant's Appendix, Volume I (1AA) at 001-012. An Amended Information was filed on May 2, 2001, to correct a typographical error. Id. at 018-29. On October 11, 2001, following the partial granting of a pre-trial habeas petition, the State filed a Second Amended Information with a total of thirty-eight (38) counts. Id. at 066-076.

On May 15, 2008, Appellant filed a Motion to Sever Counts 30, 31, and 32, which alleged Burglary While in Possession of a Deadly Weapon, Attempt Robbery with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon, respectively, all against the same victim. See 1AA at 074, 077. After the district court allowed severance of those counts, the State filed a Third Amended Information in the instant underlying case on April 30, 2009, charging Appellant with the aforementioned crimes as Counts 1-3. Respondent's Appendix ("RA") at 001-002.

On May 8, 2009, after five (5) days of trial, the jury returned its verdict against Appellant, as follows: Count 1 – not guilty; Count 2 – not guilty; and Count 3 – guilty of second-degree murder with use of a deadly weapon. See RA at 003, 061-062. On September 30, 2009, Appellant was sentenced to one hundred twenty (120) months to LIFE imprisonment for second degree murder, with a consecutive one hundred twenty (120) months to LIFE for the use of a deadly weapon. Id. 065-066. Appellant's Judgment of Conviction was filed on October 13, 2009. Id.

Appellant unsuccessfully appealed from his Judgment of Conviction. See Appellant's Opening Brief ("AOB") at 3. Appellant likewise unsuccessfully filed three (3) previous postconviction habeas actions, the denials of which were each confirmed by the Nevada Supreme Court. See id.

On July 5, 2019, Appellant filed his fourth postconviction habeas petition. RA at 076. Following multiple supplemental pleadings, the district court dismissed Appellant's fourth petition as procedurally defaulted. See id. at 137-51. The district court noticed entry of its Findings of Fact, Conclusions of Law and Order on June 4, 2020. Id. at 136.

This Court allowed Appellant's appeal to proceed after the district court's entry of written judgment and issued a limited remand for the appointment of counsel. Appellant's Opening Brief ("AOB") was filed on April 5, 2021.

STATEMENT OF THE FACTS[1]

Appellant previously filed three (3) separate postconviction efforts, which were each denied on procedural grounds, and whose denial – and the grounds therefore – were each expressly upheld on appeal. RA at 067-069 (affirming denial of first PWHC), 070-071 (affirming denial of second PWHC), 073-074 (affirming denial of third PWHC). Appellant's instant underlying postconviction habeas

[1] The State cites only the facts relevant to the district court's dismissal of Appellant's fourth petition. NRAP 28(a)(8) (setting forth the scope of a statement of facts).

petition was likewise dismissed under the mandatory procedural bars. Id. at 140-43, 151.

In dismissing Appellant's petition, the district court made express findings that Appellant failed to demonstrate good cause and/or prejudice. RA at 143-51. Because Appellant's fourth petition was procedurally barred, and Appellant failed to demonstrate good cause and prejudice, the district court dismissed Appellant's fourth petition without holding an evidentiary hearing. Id. at 151.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion by dismissing Appellant's fourth petition without an evidentiary hearing, as Appellant's fourth petition was subject to mandatory procedural bars, and Appellant failed to demonstrate good cause or prejudice to overcome those bars. Further, Appellant raises multiple arguments on appeal that were not raised before the district court below. Therefore, the district court's dismissal should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY DISMISSING APPELLANT'S PETITION WITHOUT COUNDUCTING AN EVIDENTIARY HEARING

Appellant's sole argument[2] asserts that the district court erred by dismissing Appellant's fourth petition without an evidentiary hearing on Appellant's claims. AOB at 22. Appellant entreats this Court to consider the merits of his claims before even addressing the actual reason underlying the district court's decision. See id. at 15-19. However, the district court correctly applied the *mandatory* procedural bars; therefore, consideration of any merits of Appellant's claims was – and is – unwarranted.

A. Consideration of the Procedural Bars to a Habeas Petition is Mandatory

The Nevada Supreme Court has expressly proclaimed, "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." State v. Eighth Judicial Dist. Ct. ("Riker"), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). Indeed, the Riker decision reflects the mandatory language of the habeas procedural statutes, and the Nevada Supreme Court guidance on application of those procedural rules. See, e.g., NRS 34.810(2) ("…*must* be

[2] On page iv of AOB, Appellant indicates that an issue to be considered is whether "[t]he State improperly brought in evidence of Appellant's co-defendant's plea of guilt…" However, Appellant fails to subsequently address this claim, much less provide cogent argument or relevant legal support for this assertion. See generally AOB. Therefore, the State declines to address this claim, as Appellant has failed to provide any basis for consideration thereof. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); see also NRAP 28(a)(10).

dismissed…" (emphasis added)); see also Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) ("A court *must* dismiss…" (emphasis added)).

Because consideration of the habeas procedural rules is mandatory, not permissive, the district court's decision to apply the procedural rules before considering any merits of Appellant's fourth petition should be affirmed.

B. The District Court Correctly Found the Petition Untimely Under NRS 34.726

NRS 34.726(1) explains, "a petition that challenges the validity of a judgment or sentence must be filed *within 1 year*" of a judgment of conviction or remittitur from a direct appeal. (Emphasis added). The Nevada Supreme Court has determined that, per the plain language of the statute, the one-year time bar begins to run from the date the judgment of conviction, or the remittitur from a timely direct appeal, is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its plain meaning).

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late, citing the "plain and unambiguous" mandatory provisions of NRS 34.726(1). The Gonzales Court reiterated the strict, mandatory construal of the one-year mandate. 118 Nev. at 592, 590 P.3d at 902.

In the instant underlying case, remittitur from Appellant's direct appeal was filed on December 3, 2010. Therefore, pursuant to NRS 34.726(1), Appellant had until December 3, 2011, to timely file a postconviction habeas petition. Appellant's fourth petition was filed on July 5, 2019, nearly eight (8) years after the statutory period for filing. Therefore, the district court correctly found that Appellant's fourth petition was barred by NRS 34.726(1). See RA at 141.

Appellant asserts that, for emotional or policy reasons, the time-bar was incorrectly applied to the instant case. AOB at 20-22. However, Appellant overlooks that application of the time-bar is mandatory. Gonzales, 118 Nev. at 592, 590 P.3d at 902. Therefore, Appellant's argument is more appropriately an argument towards "good cause," addressed in Section I(E), *infra*. To the extent that Appellant attempts a *legal* argument against application of the time-bar, Appellant's argument is expressly belied by the affirmance of the application of the time-bar in each of Appellant's previous three (3) postconviction efforts. See RA at 067 (finding Appellant's first petition untimely and procedurally barred), 070 (Appellant's second petition was untimely filed), 073-074 (the district court correctly denied Appellant's third petition as procedurally barred).

Because Appellant's fourth petition was untimely pursuant to the mandatory provisions of NRS 34.726(1), the district court correctly found that Appellant's fourth petition was procedurally barred.

C. The District Court Correctly Found the Petition Successive and an Abuse of the Writ Under NRS 34.810

Pursuant to NRS 34.810(2):

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added). In other words, if a claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McCleskey v. Zant, 499 U.S. 467, 497-98 (1991). Second or successive petitions will only be considered on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Lozada Court explained: "[w]ithout such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court has pertinently recognized: "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford

v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Appellant previously filed three (3) habeas petitions, all of which were denied as untimely and/or otherwise procedurally barred. See RA at 067-075. On appeal, the Nevada Supreme Court affirmed the application of the procedural bars. Id. In denying Appellant's third petition, the district court rejected Appellant's assertion of actual innocence, which was likewise affirmed on appeal. Id. at 073-074. In his fourth petition, Appellant asserted five (5) separate grounds for relief, each of which could have been raised in one of his earlier petitions. See RA at 100-123.

Because Appellant could have earlier asserted the claims he raised in his fourth petition, the district court did not err in determining that Appellant's fourth petition was successive and constituted an abuse of the writ.

D. The District Court Correctly Found the Petition Subject to Laches

Pursuant to NRS 34.800, there is a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" In Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984), the Nevada Supreme Court explained, "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." To invoke this presumption, NRS 34.800(2) requires that the State affirmatively plead laches.

Appellant filed his fourth petition on July 5, 2019, over ten (10) years after the verdict, and nearly nine (9) years after the Nevada Supreme Court affirmed Appellant's Judgment of Conviction. As such, pursuant to statute, the conditions for a presumption of prejudice to the State were met.

Because over five (5) years elapsed between the remittitur from Appellant's direct appeal, and the filing of Appellant's fourth petition, the district court properly found Appellant's fourth petition subject to laches.

E. The District Court Correctly Found Appellant Failed to Demonstrate Good Cause and Prejudice to Overcome the Procedural Bars

To avoid procedural default, a petitioner has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again *and* actual prejudice to the

petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) (emphasis added).

The district court found that Appellant failed to demonstrate *either* good cause *or* prejudice sufficient to overcome Appellant's procedural defaults. RA at 150-51 ("Petitioner fails to demonstrate good cause or prejudice to overcome the procedural bars to the instant Petition…"). Not only does Appellant fail to undermine the district court's determination, but Appellant attempts to introduce arguments for the first time on appeal; therefore, the district court's findings should be affirmed.

1. Appellant's instant good cause argument was not raised before the district court

Appellant contends that the time-bar to his first petition should have been overlooked because he was a juvenile with a low IQ. AOB at 20. However, this is not the argument Appellant raised in his fourth petition. See RA at 076-123. Indeed, the only argument that could be construed as a good cause argument in Appellant's fourth petition alleged actual innocence, and was raised as a substantive ground for relief. See id. at 100-04.

The Nevada Supreme Court has explained that an "appellant's failure to raise…issues below precludes appellate review." Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997), *overruled on other grounds by* Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999). Indeed, the Nevada Supreme Court has continuously declined to address postconviction claims that are raised in the first instance on

appeal. See McNelton v. State, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Therefore, because Appellant's appellate good cause argument was not raised before the district court – instead, it is raised for the first time on appeal – that argument cannot be considered here.

Moreover, a review of the substance of Appellant's good cause contention reveals that Appellant's argument relate to the filing of Appellant's first petition. See AOB at 20 ("Approximately fourteen (14) months after his remittitur was issued, the District Court received his first pro per IAC petition. (AA, Vol. #, pp. #)."). Appellant's first petition was denied as untimely, and that denial was expressly affirmed on appeal. RA at 067-069. Necessarily, this argument was available to be raised in any of Appellant's earlier petitions, or appeals therefrom, so this argument cannot be considered here even if it had been raised before the district court in Appellant's fourth petition. Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003) ("a claim or allegation that was reasonably available to the Appellant during the statutory time period would not constitute good cause to excuse the delay.").

Ultimately, however, claims of limited intelligence and lack of assistance with filing a postconviction petition have already been found *not* to constitute good cause. Phelps v. Dir., Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), *superseded by statute on other grounds as stated in* State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003). Therefore, even if Appellant's argument

– raised for the first time in the instant appeal, and available for Appellant's earlier pleadings – could be considered, it would still not constitute good cause to overcome the procedural defaults upon which Appellant's fourth petition was dismissed.

2. Appellant failed to demonstrate good cause

As stated *supra*, the only argument in Appellant's fourth petition that could be construed toward good cause asserted Appellant's actual innocence. See RA at 100-104. The district court correctly determined that this assertion failed to demonstrate good cause.

Pursuant to United States Supreme Court precedent, a claim of actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995). In order to demonstrate actual innocence, a petitioner must prove that "'it is more likely than not that no reasonable juror would have convicted him in light of the 'new evidence' presented in habeas proceedings.'" Calderon v. Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998) (quoting Schlup, 513 U.S. at 327, 115 S.Ct. at 867).

Though billed as an "actual innocence" claim, Appellant's claim merely challenged the sufficiency of the evidence supporting his conviction. RA at 100 ("Petitioner asserts that there is no evidence in the instant case to support his

unlawful conviction for second degree murder."). Appellant did not present any "new" evidence, much less meet his burden under Calderon. Id. at 100-104; 523 U.S. at 560, 118 S.Ct. at 1503. Therefore, the district court correctly concluded that Appellant failed to demonstrate actual innocence, much less establish good cause sufficient to overcome Appellant's procedural defaults.

3. Appellant failed to demonstrate prejudice

Appellant's fourth petition consisted of claims of ineffective assistance of counsel, prosecutorial misconduct, and trial court abuse of discretion. See RA at 104-123. However, each of Appellant's claims were subject to the law of the case doctrine; therefore, the district court correctly determined that Appellant failed to demonstrate prejudice.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. at 879, 34 P.3d at 532 (*citing* McNelton, 115 Nev. at 414-15, 990 P.2d at 1275).

a) Counsel's Alleged Failure to Instruct the Jury on Appellant's Theory of the Case

Appellant first alleged that trial counsel "failed to instruct the jury on Petitioner's theory of the case." RA at 106. However, the district court discerned that this claim was raised – and denied – as part of Appellant's third petition. See id. at 148 (*citing* Findings of Fact, Conclusions of Law and Order, filed on March 14, 2016, in district court Case Number 01C174954, at 5). The denial of Appellant's third petition was upheld on appeal. Id. at 073-074. Therefore, the district court correctly concluded that this claim was subject to the law of the case doctrine, and that Appellant would not be prejudiced by the dismissal thereof pursuant to procedural bars.

b) Counsel Allegedly Conceding Second Degree Murder

Appellant next alleged that counsel improperly conceded to Appellant's guilt of second degree murder at trial. RA at 107. However, this claim was raised in Appellant's second petition, which was denied, and which denial was upheld on appeal. See id. at 070-071 (affirming denial of Appellant's second petition), 148 (*citing* Findings of Fact, Conclusions of Law and Order, filed on February 14, 2014, in district court Case Number 01C174954). As such, this claim was also subject to the law of the case doctrine, and correctly deemed to fail to demonstrate prejudice.

c) Counsel's Alleged Failure to Subject Prosecution's Case to Meaningful Adverse Testing Process

Appellate included a separate claim, alleging essentially the same ineffective assistance as found in Section I(E)(3)(b), *supra*., regarding counsel's alleged concession of second degree murder. RA at 108-09. Because that first iteration of this claim was previously rejected by both the district court and the Nevada Supreme Court, Appellant's altered version of this claim was still subject to the law of the case doctrine. Hall, 91 Nev. at 316, 535 P.2d at 799. Therefore, the district court correctly found that this claim could not demonstrate prejudice.

d) Counsel's Alleged Failure to Object to Petitioner's Statement as Involuntary

Appellant also raised a claim against counsel's alleged failure to object to his statement to police. RA at 110. However, the district court found that this claim was precluded, as it was raised – and rejected – on direct appeal. Id. at 149. Further, the district court determined that the record belied Appellant's claim, as counsel had filed a motion challenging Appellant's statement to police. See id. Because the district court determined that the claim was both subject to the law of the case doctrine, and belied by the record, the district court properly found that Appellant's claim could not demonstrate prejudice.

e) Appellate Counsel's Alleged Failure to Raise Issue of Prosecutorial Misconduct on Direct Appeal

The district court also rejected Appellant's claim that appellate counsel failed to allege prosecutorial misconduct, as that claim *was* raised on direct appeal. See RA at 149-50. As the claim itself was substantively rejected in an earlier proceeding – belying Appellant's instant underlying claim – the district court correctly rejected any inference of prejudice.

f) Appellate Counsel's Alleged Failure to Raise Issue of Ineffective Assistance of Trial Counsel

Appellant also presented an amalgam of his earlier allegations against trial counsel, reframed as an allegation against appellate counsel. RA at 115-17. As Appellant's claim was merely a derivative claim, based on claims that themselves were subject to the law of the case doctrine, the district court correctly determined that Appellant's amalgam did not demonstrate prejudice.

g) Claims of Prosecutorial Misconduct and Trial Court's Abuse of Discretion

Appellant raised two separate claims, which the district court determined were substantively the same as Appellant's claims of ineffective assistance of counsel. See RA at 150-51. This determination is supported by a review of Appellant's fourth petition, as these claims all relied on Appellant's argument against the validity of his Miranda waiver based on Appellant's mental handicaps. See id. at 100-123. As the underlying basis for these claims was previously considered and rejected, the district

court properly determined that these claims were likewise subject to the law of the case doctrine. Hall, 91 Nev. at 316, 535 P.2d at 799.

F. Appellant Raises an Ineffective Assistance Claim for the First Time on Appeal

Appellant also includes in AOB a new claim of ineffective assistance of counsel. See AOB at 17 (alleging a failure "to present the appropriate defense"). Not only does this claim not comport with Appellant's other claims of ineffectiveness, but its appearance in the first instance on appeal precludes this Court's review thereof.

The State has, in support of the district court's determination regarding prejudice, set forth each of the grounds raised by Appellant before the district court. See Section I(E)(3), *supra*. None of these district court claims appears as the same claim raised in AOB, nor does a review of Appellant's fourth petition reveal the substance of this claim. See RA at 100-123. Therefore, because this claim has been raised for the first time on appeal, this Court should decline consideration of the same. See Hewitt, 113 Nev. at 392, 936 P.2d at 333; see also McNelton, 115 Nev. at 415-16, 990 P.2d at 1275-76.

Moreover, it is puzzling that Appellant would argue that counsel *should have* conceded guilt to manslaughter, while arguing that counsel was ineffective for conceding guilt to second degree murder. Compare AOB at 17-19 with RA at 107-08. Further, Appellant's argument that counsel *should have* conceded guilt to

manslaughter directly contradicts Appellant's assertions of innocence. See RA at 100-104. Therefore, not only is Appellant's new claim improperly raised for the first time on appeal, but it appears to be undermined by the claims Appellant *actually* raised before the district court in Appellant's fourth petition.

Because Appellant's new claim should not be considered, it cannot form a basis for overturning the district court's dismissal of Appellant's fourth petition on procedural grounds.

G. Appellant was not Entitled to an Evidentiary Hearing

The Nevada Supreme Court has expressly stated that district courts "may also reject…substantive post-conviction claim[s] without an evidentiary hearing when the claim is procedurally barred and the defendant cannot overcome the procedural bar." Rubio v. State, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008) (*citing* Little v. Warden, 117 Nev. 845, 853-54, 34 P.3d 540, 545 (2001)).

The district court determined that Appellant's fourth petition was procedurally barred, and that Appellant could not overcome those procedural bars. See RA at 150-51 ("…because Petitioner fails to demonstrate good cause or prejudice to overcome the procedural bars to the instant Petition, this Court concludes the instant Petition is ripe only for summary dismissal."). Therefore, pursuant to Nevada precedent, the district court properly determined that no evidentiary hearing was necessary. Rubio, 124 Nev. at 1046 n.53, 194 P.3d at 1234 n.53.

Because Appellant's fourth petition was dismissed on procedural grounds, the district court correctly declined to conduct an evidentiary hearing on Appellant's substantive claims.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the district court's dismissal of Appellant's fourth petition.

Dated this 5th day of May, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 4,234 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of May, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 5, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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