IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY JOSEPH HARRIS, Appellant, v. STATE OF NEVADA, ET AL., Respondents.	**No.: 81430**

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE TREVOR ATKIN
DISTRICT COURT CASE NO.: A-19-805689-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Appellant Anthony Joseph Harris is an individual. In the proceedings below, Harris represented himself pro se. Holland & Hart LLP is the only law firm to represent Harris before this Court. Harris has been represented by Joshua M. Halen, Esq., and Matthew B. Hippler, Esq., of Holland & Hart LLP before this Court.

DATED this 5th day of August, 2021

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Nevada Rule of Appellate Procedure 3A(b)(1), as all Defendants were dismissed via various Orders granting motions to dismiss. The last Defendants were dismissed on July 10, 2020, via the District Court's Order Granting Motion to Dismiss Complaint Pursuant to NRCP 4, with Notice of Entry of Order filed July 14, 2020. (Trial Court Record, Vol. 3, App. 634.) Appellant Anthony Joseph Harris ("Harris") filed his timely Notice of Appeal on June 30, 2020 (Vol. 3, App. 588-591), which was filed and effective on July 14, 2020, under NRAP 4(6). No court dismissed the Notice of Appeal before Notice of Entry of the District Court's Order Granting Motion to Dismiss Complaint Pursuant to NRCP 4.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court of Nevada. This appeal raises matters of first impression involving the United States Constitution and issues of statewide public importance. *See* NRAP 17(11), (12). This appeal raises, in part, the necessary level of personal participation to establish liability for a violation of the U.S. Constitution, raised pursuant to 42 U.S.C. § 1983, and the related issue of qualified immunity related to personal participation, matters that have not been addressed by the Nevada Supreme Court. Additionally, this appeal raises issues of first impression related to NRCP 4.2 and service of a summons and

complaint on public employees, an issue of statewide public importance. Accordingly, this matter should be retained by the Nevada Supreme Court.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that Harris, as a pro se litigant, failed to allege a 42 U.S.C. § 1983 claim alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment to the U.S. Constitution, when his Complaint provided specific facts of the medical harm he suffered and put Warden Williams on notice that his inaction contributed his pain and suffering.

2. Whether the District Court erred in dismissing Harris's suit with prejudice based on the omission of facts and denying Harris the right to amend his Complaint to allege facts sufficient to establish that Warden Williams was deliberately indifferent to his serious medical needs.

3. Whether the District Court erred in granting Warden Williams qualified immunity based on its holding that it is not clearly established that responding to an inmate's grievance raising an ongoing medical issue rises to the level of personal participation to state a § 1983 claim, when the Ninth Circuit Court of Appeals and the U.S. District Courts within the circuit have held that such conduct clearly constitutes a violation of the Eighth Amendment.

4. Whether the District Court erred in misconstruing and misapplying NRCP 4 and 4.2, while ignoring NRCP 4.2(d)(6)(A), when dismissing Harris's Complaint and not providing him reasonable time to complete dual service of certain defendants after Harris had served the Nevada Attorney General with the summons and Complaint for certain defendants.

5. Even in the absence of NRCP 4.2(d)(6) and its command that Harris be provided additional time to complete service, whether the District Court abused its discretion in denying Harris additional time to complete service when he diligently attempted to complete service and the State Defendants waited six months after Harris's service attempts to raise any issue related to service.

STATEMENT OF THE CASE

Harris is an inmate in the custody of the NDOC and filed his Complaint pro se in the Eighth Judicial District Court of Nevada. Harris listed several theories in his Complaint, but included one claim for a violation of his Eighth Amendment rights to be free from cruel and unusual punishment under the U.S. Constitution. Harris alleged that he suffered extreme chest pains while at High Desert State Prison ("HDSP"). Harris alleged he made several staff members at HDSP aware of his severe chest pains and that they all failed to take any actions to provide him medical care, establishing their deliberate indifference to his serious medical needs in violation of the Eighth Amendment to the U.S. Constitution.

Defendants included various Nevada Department of Corrections ("NDOC") employees, the NDOC itself, current and former members of the Nevada State Board of Prison Commissioners, and the State of Nevada. After Harris served the Complaint on certain Defendants, various Defendants filed motions to dismiss raising technical and procedural arguments. Defendant Brian Williams, warden at HDSP ("Warden Williams"), moved to dismiss pursuant to NRCP 12(b)(5), arguing that Harris failed to allege his personal participation necessary for a 42 U.S.C. § 1983 claim, and that he was entitled to qualified immunity for the same reasons. Numerous Defendants also moved for dismissal arguing that while Harris had served the Nevada Attorney General with the summons and Complaint, Harris had failed to serve the Defendants personally or through a designated agent, thus failing to comply with the dual service requirements of NRCP 4.2(d)(2) for suing State employees within 120-days of the filing of the Complaint.

The District Court granted Warden Williams's Motion to Dismiss with prejudice, finding that Harris had failed to allege specific facts regarding personal participation, while also granting him qualified immunity on the same basis. The District Court also granted the Defendants' Motion to Dismiss, finding that Harris, as a pro se litigant, failed to comply with the dual service requirements of NRCP 4.2(d)(2) within 120-days, and that despite his service of the Nevada Attorney General, Harris was not entitled to an extension to complete service. As will be

demonstrated, the District Court committed several legal errors and abused its discretion in granting the motions to dismiss.

STATEMENT OF THE FACTS

A. Factual background

1. *Harris's extreme chest pains are ignored by HDSP staff.*

Harris is an inmate in the custody of the NDOC, and was located at HDSP in 2018 and 2019. (Vol. 1, App. 6, 14, 16.) Harris was "forced to suffer extreme chest pains by the defendants' complete refusal to properly treat his serious medical issue, which could have resulted in either : (1) a stroke; (2) a heart attack; or (3) death of the Plaintiff." (Vol. 1, App. 18.)[1]

During the last week of December 2018, Harris alerted a pill call nurse, Defendant Jane Doe 1, at HDSP that he was having extreme chest pains. (Vol. 1, App. 18.) Jane Doe 1 told Harris to fill out a "kite" to request medical attention, but did nothing else. (Vol. 1, App. 18.) On January 6, 2019, Harris was again suffering from extreme chest pains and notified Jane Doe 1 of the issue, and again

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[1] As the Court is aware, when reviewing an order granting a motion to dismiss brought pursuant to NRCP 12(b)(5), the Court "presum[es] all alleged facts in the complaint to be true and draw[s] all inferences in favor of the plaintiff." *Facklam v. HSBC Bank USA*, 133 Nev. 497, 498, 401 P.3d 1068, 170 (2017) (citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)).

Jane Doe 1 told Harris to fill out a kite and offered no other assistance. (Vol. 1, App. 19.)

On March 27, 2019, Harris "suffered such extreme chest pains, that they actually brought him to his knees, and in front of a different pill call nurse, James Tolman." (Vol. 1, App. 19.) Defendant Tolman told Harris to drink water and stay off his feet, but offered no other medical services. (Vol. 1, App. 19.)

On the same day, March 27, 2019, Harris initiated the NDOC inmate grievance process by filing an informal level grievance. (Vol. 1, App. 19.)

The NDOC grievance process is governed by NDOC Administrative Regulation 740 ("AR 740"). AR 740 at *passim*.[2] The inmate grievance process is used as the administrative process that NDOC inmates utilize to address claims related to prison conditions, property damage, personal injuries, and civil rights claims related to prison life. AR 740 at 1. In order to utilize the grievance process, an inmate files an informal level grievance, and then if he or she is dissatisfied with the response, may appeal the informal response by filing a first level

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[2] AR 740 is available at https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20740%20-%20Inmate%20Grievance%20Procedure%20-%20Temporary%20-%2011.20.2018.pdf.
Harris requests that the Court take judicial notice of AR 740, pursuant to NRS 47.140(6). AR 740 is a regulation that was adopted by the NDOC pursuant to NRS 209.131(6) and NRS 209.243.

grievance, and then may appeal that response via a second level grievance, with each level of the grievance being reviewed by a more senior NDOC official. AR 740.08-.10. For example, an informal level grievance is reviewed by "the Department Supervisor that has responsibility over the issues that is being grieved or designated person." AR 740.08. "A First Level Grievance (Form DOC-3093) should be reviewed, investigated and responded to by the Warden at the institution where the incident being grieved occurred, even if the Warden is the subject of the grievance." AR 740.09(1). Further, the warden may utilize staff in developing a response to the first level grievance. AR 740.09(1)(A). Finally, the second level grievance is reviewed and responded to by a deputy director of the NDOC or medical director for health issues. AR 740.10.

2. ***Harris's grievances are denied, and he receives delayed medical attention for his extreme chest pains.***

Harris's informal level grievance was assigned number 20063081051. (Vol. 1, App. 19.) On June 6, 2019, Harris received the denial of his informal level grievance, which was denied by Defendant N. Peret. (Vol. 1, App. 20.) On June 7, 2019, Harris filed his first level grievance. (Vol. 1, App. 20.) According to AR 740.09(1), the warden at HDSP, Warden Williams, was required to review, investigate, and respond to Harris's first level grievance. Warden Williams was permitted to utilize a staff member to develop the response, but AR 740.09(1) requires the Warden to investigate and respond to the first level grievance. AR

740(1), (1)(A). On July 2, 2019, Harris received the denial of the first level grievance that was signed by Defendant Bob Foulkner. (Vol. 1, App. 20.)

While Harris's first level grievance was pending, he was taken to Nevada Heart and Vascular Center on June 14, 2019, only to be told that his appointment was actually for June 12, 2019. (Vol. 1, App. 20.) Harris was taken to a cardiologist on July 23, 2019, and was told to return in 30 days. (Vol. 1, App. 20.) Forty-eight days later, Harris was taken to a cardiologist on October 4, 2019. (Vol. 1, App. 21.) Accordingly, while Harris's first level grievance was pending, he had not seen a cardiologist or any other medical professional for his extreme chest pains that he had been suffering for close to seven months. (Vol. 1, App. 18-20.)

After Harris's first level grievance was denied, he filed his second level grievance on July 2, 2019, and that grievance was denied on September 10, 2019. (Vol. 1, App. 20-21.) During the time Harris did not receive medical attention, he continued to suffer chest pains and was forced to remain immobilized in his bed, waiting for medical attention. (Vol. 1, App. 23.)

B. PROCEDURAL BACKGROUND

1. *Harris filed his Complaint to vindicate violations of his civil rights and asserting various other claims and attempts service on Defendants.*

On November 4, 2019, Harris filed his Complaint in the Eighth Judicial District Court of Nevada asserting various claims for the lack of medical attention

he received from HDSP staff. (Vol. 1, App. 6-26.) Harris asserted that his Complaint was a "Civil Rights/Tort Complaint." (Vol. 1, App. 16.) Harris's Complaint lists the following claims: "Nev. Const. Art. 6 § 6; NRS Chapters 14. 30, 33. 41, and 42; U.S. Const. 1st, 8th, and 14th Amendments to U.S. Constitution; Civil Rights Act's [*sic*] of 1871 and 1991; 42 U.S.C. § 1985; 42 U.S.C. 1986; 42 USC § 1997; Americans with Disabilities act; the Rehabilitation Act; International Covenant on Civil and Political Rights; 42 U.S.C. § 1320d et. seq.; and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and/or Punishment." (Vol. 1, App. 6, 14.)

Harris brought claims against a total of 22 individual defendants and three entities, the State of Nevada, Board of Prison Commissioners, and the NDOC. (Vol. 1, App. 6-7.) Harris brought claims against current and former members of the Nevada Board of Prison Commissioners who were in office when he started to suffer extreme chest pains, including Governor Steve Sisolak and former Governor Brian Sandoval, Attorney General Aaron Ford and former Attorney General Adam Laxalt, and Secretary of State Barbra Cegavske (collectively "Commissioner Defendants").[3] (Vol. 1, App. 7, 8-13.) Harris sued the following NDOC

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[3] Pursuant to the Nevada Constitution, Article 5, § 21, the Governor of Nevada, Secretary of State of Nevada, and Attorney General of Nevada "shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law."

employees: James Dzurenda,[4] Romero Aranas, Michael Miner, Jeremy Dean, Julie Matousek, Mr. Faliszek, Mrs. Ennis, Naphcare, Inc.,[5] Bob Faulkner, N Peret, G. Worthy, G. Martin, G. Bryan, Jane Doe 1, and John Doe 1 (later identified as James Tolman). (Vol. 1, App. 7.) Finally, Harris sued Warden Williams. (Vol. 1, App. 7, 10.)

On December 13, 2019, Harris arranged to have the Carson City Sheriff serve the Commissioner Defendants by delivering a copy of the summons and Complaint to Brandon Salvers, an authorized individual at the Nevada Attorney General's Office in Carson City, Nevada. (Vol. 1, App. 199-204.) On the same day, the Carson City Sheriff, on behalf of Harris, served the following Defendants by delivering a copy of the summons and Complaint to Brandon Salvers, an authorized individual at the Nevada Attorney General's Office in Carson City, Nevada: Defendants Michael Miner, Romeo Aranas, Jeremy Dean, Julie Matousek, Mr. Faliszek, Mrs. Ennis, Naphcare, Inc., Bob Faulkauer, N Peret, G. Worthy, G. Martin, G. Bryan, Jane Doe 1, and James Tulman (collectively "State Defendants"). (Vol. 1, App. 205-218.) On December 16, 2019, the Carson City Sheriff, on behalf of Harris, served Warden Williams and the NDOC by having a

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[4] Harris filed a Notice of Motion to Remove Defendant James Dzurenda on March 16, 2020. (Vol. 1, App. 119-21.)

[5] Naphcare Inc. appears to be a private entity that has a contract to provide medical services to NDOC and HDSP. (Vol. 1, App. 11-13, 16.)

copy of the summons and Complaint delivered to Nancy Sanders (AAII), an authorized individual at the NDOC, at 5500 East Snyder Avenue Carson City, NV 89701. (Vol 1, App. 220-21.) Further, the NDOC did not accept service on behalf of Defendant Dzurenda as he was a former employee. (Vol. 1, App. 223.)

2. ***Warden Williams files his Motion to Dismiss and Harris requests to amend his Complaint.***

On January 30, 2020, Warden Williams filed a Motion to Dismiss, pursuant to NRCP 12(b)(5).[6] Warden Williams argued that Harris's Complaint failed to make any allegations that he personally participated in, or was somehow responsible for, any constitutional violation Harris suffered. (Vol. 1, App 30-37.) Warden Williams argued he could not be liable as a supervisor for a § 1983 claim, and that the Complaint was based on his status as supervisor. (Vol. 1, App. 33-34.) Further, Warden Williams argued that there were no allegations that he knew of Harris's extreme chest pains, or that he took any actions in denying Harris medical attention. (Vol. 1, App. 34.) Finally, Warden Williams argued that he was entitled to qualified immunity as he had not engaged in any constitutional violation, and

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[6] Warden Williams's Motion to Dismiss omitted any arguments that service was improper under NRCP 12(b)(3) or (4). The failure to raise any arguments related to NRCP 12(b)(3) or (4) in the Motion to Dismiss results in a waiver of any claims of improper service. *See* NRCP 12(g)(2), 12(h)(1). Additionally, the Motion to Dismiss filed on January 30, 2020, was brought by Warden Williams and the NDOC. As Harris is not appealing the dismissal of the NDOC, no discussion of the NDOC's arguments are included herein.

the law was not clearly established that his alleged lack of action was sufficient to put him on notice that he had violated Harris's constitutional rights. (Vol. 1, App. 35-36.)

Harris filed his Opposition to Warden Williams's Motion to Dismiss on February 11, 2020. (Vol. 1, App. 42-45.) Harris argued that Warden Williams was aware of his extreme chest pains as he filed a first level grievance detailing his chest pains and that Warden Williams was required to review, investigate, and respond to the first level grievance. (Vol. 1, App. 43.) Because Warden Williams was required to review the first level grievance, he was personally aware of Harris's ongoing medical condition and failed to take any action to protect Harris, thus making him liable for a claim of deliberate indifference under the Eighth Amendment to the U.S. Constitution. (Vol. 1, App. 43-44.) Additionally, Harris asserted that in the third quarter of 2019, "Warden Williams was in the chapel and this matter was brought to his attention, once it was mentioned about being ready to file in court he cut the conversation and said 'oh that's it! I can't talk to you anymore…,'" establishing that Warden Williams was aware of his situation. (Vol. 1, App. 43.) Further, Harris argued that the law is clearly established that when a state official knows of and either fails to act or continues the constitutional violation, the official is liable, thus Warden Williams was not entitled to qualified immunity. (Vol. 1, App. 44-45.)

In Harris' s Opposition, he also sought permission to file an amended complaint to add additional facts to his claims and an additional cause of action for retaliation, in violation of the First Amendment to the U.S. Constitution. (Vol. 1, App. 45.) As stated by Harris in his Opposition, he "respectfully request[ed] permission to submit an amended complaint as well, as [he is] incarcerated and used inadequate legal aide. [He] now notice[d] that some facts were not submitted in the first complaint, as well as [he] would like to add the retaliation [he has] been experiencing since filing [his] complaint." (Vo. 1, App. 45.)

Warden Williams filed his Reply, arguing that Harris's Complaint does not make clear any allegations of Warden Williams's personal participation and that "even if the Complaint had alleged Warden Williams responded to the Grievance, that allegation is insufficient to establish personal participation." (Vol. 1, App. 91.) Additionally, Warden Williams argued that the Complaint itself lacked allegations that he was deliberately indifferent, ignoring the allegations in Harris's Opposition to the contrary. (Vol. 1, App. 92.) Finally, Warden Williams argued that he was entitled to qualified immunity as the Complaint supposedly failed to contain sufficient allegations that he was personally involved in any wrongdoing. (Vol. 1, App. 93.) Warden Williams also ignored Harris's request to amend his Complaint. (Vol. 1, App. 88-94.) Arguing instead that, because Harris did not include

sufficient facts in his Complaint, he could never include sufficient facts to state a claim against Warden Williams. (Vol. 1, App. 88-94.)

The District Court held a hearing on Warden Williams's Motion on March 3, 2020. (Vol. 2, App. 268.) Warden Willimas' counsel was present at the hearing, while Harris was not present, despite his filing of a Motion Requesting Order to Compel Attendance by Plaintiff via Telephonic Court on February 19, 2020. (Vol. 1, App. 48-51.)

After the hearing, the District Court granted Warden Williams's Motion on May 29, 2020. (Vol. 2, App. 268-74.) The District Court held that Harris's Complaint failed to allege sufficient facts that Warden Williams personally participated in any alleged constitutional violations, that Warden Williams was not on notice of Harris's extreme chest pains via his grievance, and that responding to a grievance is not sufficient to expose Warden Williams to liability. (Vol. 2, App. 271-72.) The District Court also granted Warden Williams qualified immunity, holding that because the Complaint did not contain any allegations that Warden Williams participated in or was on notice of Harris's claims, Harris could not allege any facts to establish Warden Williams's liability. (Vol. 2, App. 273.) The District Court thus dismissed Warden Williams from Harris's suit with prejudice. (Vol. 2, App. 274.) The District Court did not address Harris's request for leave to file an amended complaint. (Vol. 2, App. 268-75.)

3. *Harris Moves for Reconsideration, or to Alter or Amend the Judgment Regarding the Dismissal of Warden Williams*

On May 8, 2020, Harris filed a Motion for Reconsideration or a motion to Alter or Amend the Judgment regarding the District Court's Order granting dismissal of Warden Williams. (Vol. 2, App. 258-63.)[7] Harris sought reconsideration on two grounds. First, he argued that the court overlooked his request in his Opposition to Warden Williams's Motion to Dismiss for leave to file an amended complaint to allege additional facts to support his claims against Warden Williams, and to assert additional claims that were omitted from the Complaint. (Vol. 2, App. 259.) Harris offered that he had relied on a "jailhouse lawyer" to draft his Complaint, and the drafting was deficient. (Vol. 2, App. 259.) Harris also requested that the Order remove the holding that Warden Williams be dismissed with prejudice, and instead that the claims be dismissed without

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[7] Harris also sought reconsideration of the Order granting dismissal of the Commissioner Defendants. (Vol. 2, App. 261.) As Harris does not appeal the granting of dismissal against these Defendants, no mention of the Order or the reconsideration arguments are included herein.

Additionally, the Journal entry for the March 3, 2020 hearing, on Warden Williams's motion to Dismiss states that the Motion was granted on March 3, 2020, with prejudice, and that Mr. Harris was to prepare the order. (Vol. 3, 644.) This appears to be in error, and may have resulted in the delay of the Order granting Warden Williams's Motion until May 29, 2020. Harris stated in his Motion for Reconsideration that he was aware of the dismissal with prejudice of Warden Williams before the entry of the Order as a family members had informed him that the District Court's website stated that the hearing was held and dismissal with prejudice was ordered. (Vol. 2, App. 261.)

prejudice or that he be granted leave to amend. (Vol. 2, App. 262.) Second, Harris objected to the hearing being held without him present and argued that the hearing was conducted ex parte and that he requested to attend the hearings, and that such requests went unanswered. (Vol. 2, App. 260-61.)

Warden Williams filed an Opposition to Harris's Motion for Reconsideration, responding only to the contention that the hearing was conducted ex parte. (Vol. 2, App. 402-09.) Warden Williams ignored Harris's arguments that the Complaint against him should not have been dismissed with prejudice, conceding this point. (Vol. 2, App. 402-09; *see also* Eighth J.D. Ct. R. 2.20(e) (failure to file an opposition with a memorandum of points and authorities may be construed as an admission that the motion is meritorious).) Harris filed his Reply in Support of Reconsideration again explaining that dismissal of Warden Williams should be without prejudice or that he should be given leave to amend to include facts to support Warden Williams's personal participation in the violation of his civil rights. (Vol. 3, 578-82.) Harris also filed a Motion and Order for Transportation of Inmate for Court Appearance or, in the Alternative for Appearance by Telephone or Video Conference, which went unanswered. (Vol. 3, App. 555-60.)

On June 30, 2020, the District Court held a hearing on Harris's Motion for Reconsideration, with counsel for Warden Williams present, and without Harris

present, despite his Motion. (Vol. 3, App. 614.) The District Court denied Harris's Motion for Reconsideration, holding that his absence at the hearings did not constitute ex parte communications and that Harris's failure to make proper arrangements to attend the hearings meant that he could not participate at the hearings. (Vol. 3, App. 615-16.) There was no discussion of Harris's request for leave to amend or that the "with prejudice" designation be removed. (Vol. 3, 614-17.)

4. ***The State Defendants move for dismissal based on a lack of dual service.***

On June 3, 2020, the State Defendants moved for dismissal pursuant to NRCP 4(e), alleging that Harris had failed to complete the dual service requirements of NRCP 4.2(d)(2) within 120-days. (Vol. 2, App. 285-92.) Specifically, the State Defendants argued that while Harris had served the Nevada Attorney General with a copy of the summons and Complaint for each of them, Harris had not completed service on the "current or former public officer or employee, or an agent designated by him or her to receive service of process…" within the 120 day limit of NRCP 4(e)(1). (Vol. 2, App. 289.) The State Defendants admitted that Harris served the Nevada Attorney General on their behalf on December 19, 2019, but averred that he did not complete personal service on the State Defendants or on their personal agents within 120 days, or by March 3, 2020. (Vol. 2, App. 290-91.)

Harris opposed the State Defendants' Motion, arguing that the dual service requirements were satisfied by December 16, 2019. (Vol. 3, App. 563-72.) Harris argued that a copy of the summons and Complaint was served on the Nevada Attorney General on December 13, 2019, and that the NDOC was served on December 16, 2019, satisfying the requirements of NRCP 4.2(d)(2). (Vol. 3, App. 568; *see also* Vol. 1, App. 205-218 (service of State Defendants at Attorney General's Office); Vol 1, App. 220-21 (service of NDOC).) NDOC AR 357.01 provides that "Designed Administrative Assistants in Human Resources" are authorized to accept service on behalf of current NDOC employees."[8] Harris also argued that no additional time was required since he completed service before the expiration of the 120-day deadline, and that his efforts in using the Carson City Sheriff to complete service were proper and any failure to meet the requirements of NRCP 4(e) were unknown and he satisfied the good cause requirement of NRCP 4(e). (Vol. 3, App. 570-71.) Additionally, Harris cited *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990), for the proposition "that failure by government

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[8] AR 357 is available at https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20357%20-%20Summons%20and%20Complaint%20Service%20of%20Process%20-%20Final%20-%2008302017.PDF.
Harris requests that the Court take judicial notice of AR 357, pursuant to NRS 47.140(6). AR 357 is a regulation that was adopted by the NDOC pursuant to NRS 209.131(6).

servers do not warrant dismissal where the plaintiff did what was required of him." (Vol. 3, App. 571.) Harris argued that he completed the steps to meet the dual service requirements and that any errors were unknown to him or the result of the server, and that such a situation warranted an extension of time should the District Court find that service was not completed. (Vol. 3, App. 57-72.)

The State Defendants responded by arguing that NRCP 4.2(d)(2) required service of the summons and complaint on the Nevada Attorney General and personal service on each state official employee, which Harris failed to complete. (Vol. 3, App. 596.) Additionally, the State Defendants argued that Harris was required to file a motion to extend the time for service before the expiration of the 120-day period, and that he failed to do so, warranting dismissal. (Vol. 3, App. 596.)

On July 7, 2020, the District Court held a hearing on the State Defendants' Motion, with counsel for the State Defendants present, and Harris not present, despite his Motion for Transposition of Inmate for Court Appearance or, in the Alternative, for Appearance by Telephone or Video Conference being received on June 15, 2020. (Vol. 3, 636 (date of hearing); Vol. 3, App. 515-22 (Motion for Transportation).) The District Court granted the State Defendants' Motion, holding that Harris "did not personally serve any of the [State] Defendants with a copy of the summons and the complaint" within 120-days of filing the Complaint. (Vol. 3,

App. 640-41.) Further, the District Court held that Harris did not seek an extension of the time to complete service nor did he establish good cause for seeking an extension. (Vol. 3, App. 641.) In making its findings, the District Court did find that Harris served the Nevada Attorney General with the summons and Complaint for the State Defendants. (Vol. 3, App. 637.)

Harris timely filed his Notice of Appeal on June 30, 2020 (Vol. 3, App. 588-81), and the appeal was filed and effective on July 14, 2020, when the Notice of Entry of Order granting the State Defendants' Motion to Dismiss was filed (Vol. 3, App. 634-34; *see also* NRAP 4(a)(6)). The District Court's Order granting the State Defendants' Motion to Dismiss stated that "[t]here are no Defendants remaining in this matter…" (Vol. 3, App. 641), and no dismissal of the appeal was filed before the Notice of Entry of Order was filed.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Warden Williams's Motion to Dismiss and dismissing him with prejudice. First, Harris's Complaint lists several allegations, which are accepted as true and should be drawn in his favor especially given his pro se status, and they meet Nevada's notice pleadings requirements. Harris alleged that he suffered severe chest pains constituting severe medical pain, and that each Defendant, including Warden Williams, was aware of his pain and

failed to act. Such allegations were sufficient to put Warden Williams on notice of Harris's claims against him.

Second, the District Court errored and abused its discretion in dismissing Warden Williams with prejudice and not providing Harris at least one opportunity to amend his Complaint to include additional allegations that Warden Williams personally participated in the violation of his civil rights. The District Court made no findings that amendment would be futile. Additionally, Harris's alleged additional facts in his Opposition were sufficient to state a § 1983 claims against Warden Williams. The District Court's failure to consider these facts and denial of the opportunity to amend, especially in light of Harris's pro se status, warrant reversal.

Third, the District Court erred in granting Warden Williams qualified immunity. Harris stated or could have provided allegations that Warden Williams personally participated in the violation of his Eighth Amendment rights. Further, the District Court's holding that it was not clearly established that a prison official who is aware of an inmate's ongoing serious medical issue and fails act to was erroneous. The Ninth Circuit and courts within the circuit have held that such conduct, including simply responding to a grievance, may result in personal liability for a § 1983 claim, thus the District Court's holding was in error and dismissal of Warden Williams with prejudice should be reversed.

Additionally, the District Court erred in not granting Harris additional time to serve the State Defendants after he served the Nevada Attorney General with the summons and Complaint. NRCP 4.2(d)(6) clearly mandates that a district court must provide additional time for a plaintiff to complete service of a state employee if the plaintiff has completed one of the two requirements for service under NRCP 4.2(d)(2). The District Court ignored NRCP 4.2(d)(6), instead holding that NRCP 4(e) was controlling.

Even if NRCP 4.2(d)(6) did not mandate the automatic granting of additional time to complete service, the District Court errored in not granting Harris additional time to complete service as requested pursuant NRCP 4(e)(4). Good cause warranted both Harris's failure to file a motion to extend the time to complete service and the additional time to complete the dual service requirements. Harris, as a pro se litigant, diligently attempted dual service of the State Defendants and believed he had properly served the State Defendants. On the contrary, the State Defendants waited three months after the deadline to complete service and six months after the Attorney General had been served to file their Motion to Dismiss. Such factors, including Harris's pro se status, warrant the granting of additional time to complete service and the District Court abused its discretion in failing to provide Harris additional time.

ARGUMENT

A. The District Court Erred in Dismissing Warden Williams With Prejudice

1. *The District Court's Order granting dismissal is reviewed de novo.*

Nevada Rule of Civil Procedure 12(b)(5) permits a district court to dismiss a complaint for failure to state a claim upon which relief can be granted. "In considering an appeal from an order granting a motion to dismiss for failure to state a claim, this court applies a rigorous, de novo standard of review." *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (citation omitted). When reviewing the order granting a motion to dismiss, this Court "accept[s] the plaintiff's factual allegations as true and then determine[s] whether these allegations are legally sufficient to satisfy the elements of the claim asserted." *Pack*, 128 Nev. at 267-68, 277 P.3d at 1248. Additionally, this Court draws all inferences in plaintiff's favor and will affirm dismissal "only if it appears beyond a doubt that it could prove not set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 673 (2008) (citations omitted).

As has been noted by this Court repeatedly, "Nevada is a notice-pleading jurisdiction where courts liberally construe pleadings so long as claims are fairly noticed to the adverse party." *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 108 n.8, 294 P.3d 427, 433 n.8 (2013) (citation omitted). Nevada remains a notice

pleading jurisdiction, even after the 2019 amendments to the Nevada Rules of Civil Procedure. *See* NRCP 12(b)(5) advisory committee's note to 2019 amendment. Further, federal courts hold that pro se complaints "must be held to less stringent standards than formal pleadings drafted by lawyers…" and that the court's "obligation remains, where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Hebbe v. Piller*, 627 F.3d 338, 342 (9th Cir. 2010) (quotation marks and citation omitted).[9] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Exec. Mgmt., Ltd. v. Ticor Title Ins., Co.*, 118 Nev. 46, 38 P.3d 872 (2002) (quotation marks and citation omitted).

2. ***The District Court erred in holding that Harris failed to provide sufficient facts to put Warden Williams on notice of Eighth Amendment deliberate indifference claim.***

The District Court's narrow construction of Harris's Complaint and granting of Warden Williams's Motion to Dismiss is contrary to this Court's longstanding precedent regarding NRCP 12(b)(5) motions and was in error. Harris's Complaint contained sufficient facts to put Warden Williams on notice of his claims, and the District Court erred in granting the Motion to Dismiss.

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[9] This is so even after *Iqbal* and *Twombly*. *Hebbe*, 627 F.3d at 342.

42 U.S.C. § 1983 provides individuals with the opportunity to bring legal actions to vindicate a violation of their civil rights by government officials, and requires a plaintiff to allege and prove that (1) they have been deprived of their civil rights secured by the Constitution and laws of the United States, and (2) that the defendant deprived them of their rights acting under color of any state law. *See*, *e.g.*, *Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. U.S. Const. amend. VIII. "The government has an 'obligation to provide medical care for those whom it is punishing by incarceration,' and failure to meet that obligation can constitute an Eighth Amendment violation cognizable under § 1983." *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)). To prevail on an Eighth Amendment claim for deliberate indifference to an inmate's serious medical needs, the plaintiff must meet "both an objective standard – that the deprivation was serious enough to constitute cruel and unusual punishment – and a subjective standard – deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014). "To meet the objective standard, the denial of a plaintiff's serious medical need must result in the 'unnecessary and wanton infliction of pain.'" *Snow*, 681 F.3d at 985 (quoting *Estelle*, 429 U.S. at 104). Warden Williams

conceded that Harris had suffered serious medical needs when he had extreme chest pains. (Vol. 1, App. 30-37.)

"A prison official is deliberately indifferent under the subjective element of the test only if the official 'knows of and disregards an excessive risk to inmate health and safety.'" *Colwell*, 763 F.3d at 1066 (quoting *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004)). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Deliberate indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." *Colwell*, 763 F.3d at 1066 (quotation marks and citations omitted). Accordingly, an inmate is not required to show that he was completely denied medical care to prevail. *Snow*, 681 F.3d at 986.

Consistent with the subjective requirement of a deliberate indifference claim, a defendant is liable under § 1983 "only upon a showing of personal participation by the defendant." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The plaintiff must show the defendant personally deprived him or her of a right secured by the constitution or laws of the United States. *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985). "A person deprives another of a

constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which the plaintiff complains." *Leer v. Murphy*, 844 F.2d 628 F.2d 628, 633 (9th Cir. 1988) (quotation marks and citations omitted). A supervisor is not liable for a § 1983 claim simply by being a supervisor. *Taylor*, 880 F.2d at 1045. Instead, "[a] supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Id.*

Harris's Complaint met the requirements to put Warden Williams on notice of his deliberate indifference to serious medical needs and to demonstrate his own participation in the deprivation of Harris's civil rights. Harris's Complaint alleged that Warden Williams was the warden and official at HDSP and that Harris's "civil rights were violated at the hands of all named Defendants, as a result of both their deliberate indifference and their intentional interference with [Harris's] serious medical needs." (Vol. 1, App. 10, 18, 21.)

The District Court, in granting Warden Williams Motion to Dismiss, focused only on the absence of Warden Williams's name from Harris's short and plain statement of the claim. The Order Granting Warden Williams's Motion stated that "[t]he Complaint does not assert any allegations against [Warden] Williams." (Vol.

2, App. 269.) This finding disregards Harris's allegation that all named Defendants were engaged in his continued serious chest pain and the failure of any Defendant to take action to treat his medical needs.

Harris's allegations put Warden Williams on notice of his claim, sufficient to meet the requirements of NRCP 8(a). *See Stockmeier v. Nev. Dep't of Corrs.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (dismissal, pursuant to NRCP 12(b)(5), is proper where the allegations are sufficient to establish the elements of the claim). Harris alleged that he suffered extreme chest pains, that he failed to receive any medical attention for his chest pain for seven months, and that the failure to receive medical attention for his chest pains was the result of each named Defendant, including Warden Williams. (Vol. 1, App. 18-23.) The District Court's requirement that Harris specifically name and detail all possible allegations against Warden Williams is more than Nevada, as a notice pleading jurisdiction, requires. *See Sowers*, 129 Nev. at 108 n.8, 294 P.3d at 433 n.8; *Stockmeier*, 124 Nev. at 316, 183 P.3d at 135; *Buzz Stew*, 124, Nev. at 228, 181 P.3d at 673. Given Harris's allegations, the District Court erred in holding that Harris could prove no set of facts, which if true, would entitle him to relief. *Buzz Stew*, 124, Nev. at 228, 181 P.3d at 673.

The District Court's strict construction of Harris's Complaint in granting Warden Williams's Motion to Dismiss also erred in failing to liberally construct

his Complaint given his pro se and incarcerated status. *See Hebbe*, 627 F.3d at 342. Harris is not a lawyer and used a "jailhouse lawyer" to assist him in drafting his Complaint. (Vol. 2, App. 260.) To hold Harris to a standard that he was required to list specific and detailed factual allegations identifying each and every possible way that Warden Williams was liable for his pain and suffering due to delayed medical treatment is more than the Nevada Rules of Civil Procedure and this Court require. *See Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (reversing district court order granting motion to dismiss as statements alleged were "susceptible" of defamatory construction). Again, this Court requires a short and plain statement of the claims sufficient to put the defendant on notice of the claim and the relief requested, which Harris met, especially in light of his pro se status.

Given Harris's allegations and constructed liberally given his pro se status, Harris demonstrated beyond doubt that Warden Williams could be liable for violating his Eighth Amendment right to be free from cruel and unusual punishment, and the District Court erred in granting the Motion to Dismiss.

3. ***The District Court erred in dismissing Harris's Complaint with prejudice.***

The District Court's harsh and unwarranted dismissal of Harris's Complaint against Warden Williams with prejudice was an error and an abuse of discretion. The District Court's failure to grant Harris even one chance to amend his Complaint warrants reversal and remand.

"Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)). This Court reviews the denial of a motion for leave to amend a complaint for abuse of discretion. *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, Ltd. Liab. Co.*, 129 Nev. 181, 191, 300 P.3d 124, 130-31 (2013) (citation omitted). "A district court's failure to consider the relevant factors and articulate why dismissal should be with prejudice instead of without prejudice may constitute an abuse of discretion." *Eminence*, 316 F.3d at 1052 (citation omitted); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.").

NRCP 15(a)(2) provides that a complaint may be amended with leave of the court and that "[t]he court should freely give leave when justice so requires." Leave to amend "should not be granted if the proposed amendment would be futile." *Gardner v. Eighth Jud. Dist. Ct.*, 133 Nev. 730, 732, 405 P.3d 651, 654 (2017) (quotation marks and citation omitted). A claim is futile if "the plaintiff seeks to amend the complaint in order to plead an impermissible claim." *Halcrow,*

Inc. v. Eight Jud. Dist. Ct., 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013) (citation omitted).

The District Court not only erred in granting Warden Williams's Motion to Dismiss despite Harris's allegations, but it then committed further error in dismissing Warden Williams from the suit **with prejudice**. The District Court made two crucial and incorrect findings in dismissing the Complaint with prejudice. First, that Harris had failed to establish that Warden Williams personally participated in the denial or delay of medical treatment, subjecting him to continued extreme chest pains. Second, that Harris's failure to allege facts to demonstrate personal participation entitled Warden Williams to qualified immunity.

i. The granting of dismissal with prejudice on the failure to allege facts, on its own, was in error.

The District Court held that because Harris had failed to allege all necessary facts in his Complaint, as a pro se litigation, it also meant that he would be unable to ever allege facts to establish personal participation and that dismissal with prejudice was warranted. The District Court erred in reaching that decision. A review of the District Court's Order granting Warden Williams's Motion to Dismiss clearly shows that the District Court did not discuss futility of amendment. (Vol. 2, App. 268-74.) The District Court held that the Complaint failed to allege that Warden Williams participated in any alleged constitutional violation or that a

grievance response was sufficient to put him on notice of Harris's claim. (Vol. 2, App. 271.) Warden Williams did not argue, and the District Court did not find, that Warden Williams was not the warden at HDSP or that Harris was not an inmate at HDSP such that Harris could never allege facts sufficient to state a § 1983 deliberate indifference claim against Warden Williams. (*See* Vol. 1, App. 30-38 (Motion to Dismiss); Vol. 2, App. 268-75 (Order Granting Motion to Dismiss).) There was simply no futility analysis by the District Court, establishing a clear abuse of discretion.

The Ninth Circuit has held that "[i]t is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (citation omitted). Further, unless amendment is clearly futile, leave to amend should be given before a dismissal with prejudice even if the plaintiff does not seek such relief. *Nat'l Council*, 800 F.3d at 1041.

In the present case, Harris as a pro se litigant both requested leave to amend his complaint and included facts to support his assertion that he could allege sufficient facts against Warden Williams. (Vol. 1, App. 43-45.) Harris alleged that Warden Williams was responsible for investigating his first level grievance, and that such investigation would have led to his discovery of his ongoing medical

problems, and that he failed failure to provide to take any steps to arrange the care necessary for Harris's extreme chest pains. (Vol. 1, App. 43; *see also* AR 740.09(1) (providing that warden at institution is responsible to review, investigate, and respond to inmate's first level grievance).)

Additionally, Harris alleged that Warden Williams was aware of his medical issue before filing his Complaint and Warden Williams responded that he could not talk to Harris. (Vol. 1, App. 43.) Such factual allegations coupled with Harris's request for leave to file an amended complaint were more than sufficient to provide Harris the opportunity to assert allegations against Warden Williams and to test the merits of the claims. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) (explaining that "when a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy."). Harris was denied that chance.

Furthermore, the District Court erred in not considering Harris's allegations regarding Warden Williams's personal participation in his Opposition. The Ninth Circuit has held that "[f]acts raised for the first time in plaintiff's opposition papers should be considered by the court in determining whether to grant leave to amend or to dismiss the complaint with or without prejudice." *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (citation omitted); *see also Shavelson v. Haw. Civ. Rights Comm'n*, 740 Fed. Appx. 532, 535 (9th Cir. 2018) (explaining that district

courts should explain deficiencies in pro se plaintiff's complaint before dismissing complaint with prejudice and reversing where plaintiff's "complaint, opposition, and motion for reconsideration all put the district court on notice that [plaintiff] was trying to allege" claims against defendant).[10]

Harris attempted to allege Warden Williams's personal participation leading to his severe medical pain and delay in receiving treatment and sought to clarify that in his Opposition to Warden Williams's Motion to Dismiss and in his Motion for Reconsideration. (Vol. 1, App. 42-45; Vol. 2, 258-63.) The District Court erred when it failed to examine whether amendment would be futile, and it was clear based on Harris's pleadings and motions that he could allege facts to allege Warden Williams's personal participation. Thus, the District Court erred in dismissing Harris's Complaint against Warden Williams with prejudice and not providing Harris with leave to amend.

ii. The District Court erred in granting Warden Williams's request for qualified immunity on the theory that he could not be liable for responding to an inmate's grievance.

The District Court granted Warden Williams qualified immunity against Harris's claims that he was deliberately indifferent to his serious medical needs.

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[10] Given Nevada's notice pleading jurisdiction and Harris's pro se status, the District Court should have considered Harris's arguments in his Opposition when reviewing Warden Williams's Motion to Dismiss. The review of new allegations in an opposition would assist the court in making its "beyond a doubt" determination.

(Vol. 2, Appl. 272-74.) The District Court held that the Complaint did not contain sufficient facts to establish that Warden Williams violated Harris's constitutional rights and that the Complaint did not allege facts that "would establish [Warden] Williams should have been on clear notice that his alleged action or inaction as a member of the Nevada Board of Prison Commissioners was constitutionally infirm…." (Vol. 2, App. 273-74).[11] The District Court's holding that Warden Williams was entitled to qualified immunity based on the lack of factual allegations and in responding to a grievance was conclusory and in error, and it warrants reversal.

The granting of qualified immunity is an issue of law courts review de novo. *See*, *e.g.*, *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018) (citation omitted). In § 1983 actions, qualified immunity grants state officials immunity from damages resulting from discretionary acts, as long as those acts do not violate clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982). In reviewing the issue of qualified immunity, courts consider two

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[11] The reference to Warden Williams as a member of the Nevada Board of Prison Commissioners was in error. The Nevada Constitution provides that the Nevada Board of Prison Commissioners is made up of the Nevada Governor, Attorney General, and Secretary of State. Nev. Const. art. 5, § 21. Warden Williams is not and was not a member of the Nevada Board of Prison Commissioners. It is believed that, as earlier in the Order, the District Court held that Warden Williams could not be liable for responding to Harris's first level grievance and was entitled to qualified immunity on the same grounds. (*See* Vol. 2, App. 271-72.)

different questions: (1) whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right"; and (2) if so, "whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236-42 (2009).

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotation marks and citation omitted). Under a qualified immunity analysis, clearly established law "should not be defined at a high level of generality." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal citation omitted). "Although [the Court's] 'caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White*, 137 S. Ct. at 551).

Courts review case law from the U.S. Supreme Court and applicable circuits when deciding whether a right was clearly established. *See Cmty. House, Inc. v. City of Boise*, 623 F.3d 945, 967 (9th Cir. 2010) (citation omitted). State courts are not bound to follow inferior federal court decisions on constitutional issues; however, courts may look to federal courts to determine whether a right was clearly established. *See Marshall v. Cnty. of San Diego*, 190 Cal. Rprt. 3d 97, 112-

13 (Ct. App. 2015) (recognizing that state courts are not bound to follow inferior federal courts, but relying on Ninth Circuit case law to determine whether a right was clearly established).

Resolving qualified immunity on a motion to dismiss can place courts in the difficult position of deciding "far-reaching constitutional questions on a nonexistent factual record." *Kwai Fun Wong v. United States*, 373 F.3d 952, 956-57 (9th Cir. 2004). "If the operative complaint contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right, then plaintiffs are entitled to go forward with their claims." *Keates*, 883 F.3d at 1235 (quotation marks and citation omitted); *see also Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001) (explaining that dismissal on a FRCP 12(b)(6) motion is not appropriate if the plaintiff alleges acts to which qualified immunity may not apply).

As discussed above, the District Court was incorrect in holding that Harris did not allege that Warden Williams personally participated in violating his Eighth Amendment right by failing to respond to his requests for medical care and in denying and delaying medical treatment. Further, the District Court erred in denying leave to amend to allege sufficient claims and made no determination that amendment was futile.

Similarly, the District Court's grant of qualified immunity based on the alleged lack of personal participation contributing to a violation of Harris's constitutional rights was in error, as Harris both alleged that Warden Williams violated his Eighth Amendment right, and he should have been given leave to amend his Complaint to make such allegations. Harris alleged that his Eighth Amendment right was violated by Warden Williams, which was sufficient at the motion to dismiss stage, especially in light of his pro se status and the fact that Harris was denied any opportunity to develop the factual record. *See Keates*, 883 F.3d at 1235. The District Court's determination that because Harris did not include sufficient facts to demonstrate personal participation in his Complaint also meant that he could never include such facts was in error and warrants reversal.

As to the District Court's second determination, that Warden Williams was entitled to qualified immunity as it was not clearly established that responding to a grievance was sufficient to establish a violation of an Eighth Amendment right, this too was in error. As discussed above, a § 1983 claim requires the plaintiff to allege that the defendant personally participated in the alleged constitutional violation. *See Taylor*, 880 F.2d at 1045. A prison official shows deliberate indifference to an inmate's serious medical needs if the official "knowingly fail[s] to respond to an inmate's request for help." *Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir. 2006) (citation omitted).

In *Snow*, the Ninth Circuit held that a NDOC warden and his assistants were not entitled to summary judgment as the evidence provided established that they were aware of an inmate's medical condition through the inmate grievance process and they failed to act to order surgery. 681 F.3d at 989. Similarly, in *Colwell,* the Ninth Circuit held that the NDOC medical director was not entitled to summary judgment on his argument that there was no personal participation as "he personally denied [plaintiff's] second-level grievance even though he was aware that an optometrist had recommended surgery and that [plaintiff's] lower-level grievances had been denied despite that recommendation." 763 F.3d at 1070. *See also Jett*, 439 at 1097-98 (holding that defendant who was aware of plaintiff's medical condition through letters and grievance and failed to act may be liable for deliberate indifference); *King v. Cox*, 2018 U.S. Dist. LEXIS 141869, at *21-22 (D. Nev. May 25, 2018) ("With respect to the second prong, the law of deliberate indifference was clear long before Defendants responded to Plaintiff's grievance in 2015. Moreover, the cases discussed above that concluded that a grievance responder could be subject to liability were decided in 2012 and August of 2014, and Plaintiff initiated his grievance in this case in January 2015. Therefore, the law was in fact clearly established.").

The United States District Court for the District of Nevada, has stated that, "if [a] [p]laintiff was proceeding with an Eighth Amendment claim which required

a showing of deliberate indifference, such as an ongoing denial of medical care or a continuing conditions of confinement claim, the fact that a prison official was given notice of the issue through a grievance and failed to act would be evidence to support the inmate's claim of liability. This is because the deliberate indifference standard requires that a prison official know of and disregard a serious risk to inmate health or safety." *Hendrix v. Nevada*, 2018 U.S. Dist. LEXIS 183330, at *51 n.6 (D. Nev. Sep. 18, 2018), *report and recommendation adopted by* 2018 U.S. Dist. LEXIS 182403 (D. Nev. Oct. 24, 2018). Similarly, in *Csech v. Babb, 2010 U.S. Dist. LEXIS 96137, at *10-*11 (D. Nev. Aug. 26, 2010)*, the United States District Court for the District of Nevada permitted claims to proceed against a warden and other grievance responders who were made aware of a plaintiff's medical claims via the inmate grievance process and failed to act to address the claims, establishing that they may be liable for an Eighth Amendment deliberate indifference claim.

Consistent with the Ninth Circuit and District of Nevada, other courts within the Ninth Circuit have held that an inmate grievance responder who was made aware of an inmate's ongoing medical harm through the grievance process and who failed to act may be liable for an Eighth Amendment claim. *See Edwards v. Hsieh*, 2016 U.S. Dist. LEXIS 54386, at *4-5 (E.D. Cal. Apr. 21, 2016) (collecting cases and holding that a deliberate indifference claim may proceed where a

"plaintiff ha[d] alleged that he put this defendant on notice through the inmate appeals process that he had ongoing serious medical conditions and was not receiving proper care."); *see also Payan v. Tate*, 2017 U.S. Dist. LEXIS 31496, at *13 (E.D. Cal. Mar. 5, 2017) ("Plaintiff has not merely complained that the defendants reviewed or denied his inmate appeal. Rather, plaintiff has alleged that he put the reviewing defendants on notice through the inmate appeals process, establishing knowledge, that plaintiff had ongoing serious medical conditions and was not receiving proper care."), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 49613, (E.D. Cal. Mar. 31, 2017); *Uriarte v. Schwarzenegger*, 2011 U.S. Dist. LEXIS 120346, at *20 (S.D. Cal. Oct. 18, 2011) (denying motion to dismiss where plaintiff alleged that defendants were on notice of medical condition via inmate grievance system and they failed to act).

Harris alleged in his Complaint that Warden Williams was responsible for his failure to receive adequate medical care for his extreme chest pain. (Vol. 1, App. 7, 10, 18-23.) In his Opposition to Warden Williams's Motion to Dismiss, Harris alleged that Warden Williams knew of his serious medical condition through the first level grievance he filed, and that he was aware of his issue before he filed his Complaint. (Vol. 1, App. 43.) Consistent with Harris's allegations, AR 740.09(1) requires a warden of the institution to review, **investigate**, and respond to an inmate's first level grievance. Further, while a warden may utilize staff to

respond to a grievance, the warden is still responsible to investigate the grievance, and there is no authority to delegate the warden's responsibility to investigate the grievance. *Id.* A warden, or any other prison official, who investigates and knows about an inmate's ongoing serious medical condition and fails to act may be liable for an Eighth Amendment violation. *See*, *e.g.*, *Colwell*, 763 F.3d at 1070. Given the case law from within the Ninth Circuit, it was clearly established in 2019 that a prison official who fails to respond to an inmate's ongoing medical problems and who is made aware of the medical problems, even via the inmate grievance process, and fails to act may be liable for an Eighth Amendment claim for deliberate indifference to serious medical needs, and thus deprived of qualified immunity.

Additionally, Harris alleged that when his first level grievance was responded to, he still had not seen a medical professional for his extreme chest pains and that he was still suffering from the condition. (Vol. 1, App. 20.) Harris received the response to his first level grievance on July 2, 2019, and saw a cardiologist for the first time on July 23, 2019. (Vol. 1, App. 20.) Accordingly, pursuant to the allegations and drawing inferences in Harris's favor as is required, Warden Williams had at the very least investigated Harris's claims before July 2, 2019, and had failed to act, which constituted sufficient allegations for a claim of deliberate indifference.

At the motion to dismiss stage, Harris was not required to prove his allegations, instead he was required to make a short and plain statement that he was entitled to relief to put Warden Williams on notice of his claims.[12] The allegation that Warden Williams investigated and was aware of Harris's severe chest pain via the grievance system and failed to act was clearly established at the time of the events, and Warden Williams was not entitled to qualified immunity. Further, the allegation that Warden Williams investigated and was aware of Harris's medical condition via the grievance process and failed to act, at the motion to dismiss stage, must be accepted as true and clearly states a deliberate indifference claim against Warden Williams. Accordingly, the District Court's granting of Warden Williams's Motion to Dismiss on the grounds that he was entitled to qualified immunity was an error and should be reversed.

B. The District Court Erred as a Matter of Law in Dismissing the State Defendants

1. *This Court Reviews the construction of the Nevada Rules of Civil Procedure de novo.*

This Court generally reviews "an order granting a motion to dismiss for failure to effect timely service of process for an abuse of discretion." *Saavedra-*

[12] The denial of qualified immunity at the motion to dismiss stage does not deprive the officials of the ability to assert the defense at a later stage and does not necessitate that the case will go to trial. *Keates*, 883 F.3d at 1240.

Sandoval v. Wal-Mart Stores, Inc., 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010) (quotation marks and citation omitted). However, "Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes." *Vanguard Piping Sys. v. Eighth Jud. Dist. Ct.*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013) (citing *Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009)). "Statutory interpretation is a question of law that we review de novo." *Vanguard*, 129 Nev. at 607, 309 P.3d at 1020.

NRCP 4.2(d)(2) provides that:

> [a]ny current or former public officer or employee of the State who is sued in his or her official capacity or his or her individual capacity for an act or omission relating to his or her public duties or employment must be served by delivering a copy of the summons and complaint to:
>
> (A) the Attorney General, or a person designated by the Attorney General to receive service of process, at the Office of the Attorney General in Carson City; and
>
> (B) the current or former public officer or employee, or an agent designated by him or her to receive service of process.

NRCP 4(e)(2) requires that "[i]f service of the summons and complaint is not made upon a defendant before the 120-day service period — or any extension thereof — expires, the court must dismiss the action, without prejudice, as to that defendant upon motion or upon the court's own order to show cause."

Finally, NRCP 4.2(d)(6) states that

> [t]he court must allow a party a reasonable time to cure its failure to:
>
> (A) serve a person required to be served under Rule 4.2(d)(1) or (2), if the party has served the Attorney General; or

> (B) serve the Attorney General under Rule 4.2(d)(1) or (2), if the party has served the required person.

Accordingly, the construction and application of NRCP 4 and 4.2 are issues of law reviewed de novo.

2. ***The District Court's Order dismissing the State Defendants without providing Harris a reasonable time to complete service, despite the command of NRCP 4.2(d)(6), was in error.***

The State Defendants moved for dismissal based on Harris's alleged failure to complete the dual service requirements of NRCP 4.2(d)(2) within 120-days. (Vol. 3, App. 636-42.) The District Court did not discuss, nor did it provide Harris any additional time to complete service on the State Defendants or their authorized agents, even though Harris had served the Nevada Attorney General, thus requiring the District to provide Harris a "reasonable time" to complete service. Accordingly, this Court should reverse the District Court's Order granting the State Defendants' Motion to Dismiss.

It is undisputed that, as presented by the State Defendants in their Motion, Harris was required to comply with the dual service requirements of NRCP 4.2(d)(2). (Vol. 2, App. 285-292.) Harris had sued the State Defendants as current or former employees of the State for actions arising or relating to their duties and employment, thus subjecting Harris to the dual service requirement of NRCP 4.2(d)(2). (Vol. 1, App. 6-13.) Accordingly, Harris was required to serve a copy of the summons and complaint to the Nevada Attorney General or a

designated person at the Office and the State Defendants or their agent designated to accept service on their behalf. NRCP 4.2(d)(2).

On December 13, 2019, Harris arranged to have the Carson City Sheriff serve the summons and Complaint to the Attorney General's Office, who accepted service on behalf of the State Defendants and other Defendants. (Vol. 1, App. 53-73.) Accordingly, Harris satisfied NRCP 4.2(d)(2)(A) by serving a copy of the summons and Complaint on the Attorney General on behalf of the State Defendants. Harris also arranged to have the summons and Complaint delivered to the NDOC's Carson City office on behalf of the NDOC, Warden Williams, and James Dzurenda; however, service was not accepted on behalf of James Dzurenda as he was a former employee. (Vol. 1, App. 74-78.)

Despite the satisfaction of NRCP 4.2(d)(2)(A), the State Defendants moved for dismissal pursuant to NRCP 4 as Harris did not complete service on the State Defendants individually or an agent designated to accept service on their behalf. (Vol. 2, App. 285-92.) The State Defendants did not cite or even discuss NRCP 4.2(d)(6)'s command that the District Court was required to provide Harris additional time to complete service since NRCP 4.2(d)(2)(A) had been satisfied. (Vol. 2, App. 285-92.) Instead, the State Defendants argued that Harris had failed to satisfy NRCP 4.2(d)(2)(B) within 120-days and had failed to make a motion for extension of time, thus case closed and their Motion must be granted. (Vol. 2, App.

285-92.) The District Court agreed with the State Defendants and erroneously held that Harris's failure to satisfy NRCP 4.2(d)(2)(B) within 120-days warranted dismissal. (Vol. 3, App. 636-42.) The District Court did not discuss or apply NRCP 4.2(d)(6) in its Order. (Vol. 3, App. 636-42.)

NRCP 4.2(d)(6) requires that a district court "must allow a party a reasonable time to cure" its failure to comply with either NRCP 4.2(d)(2)(A) or (B) if one of the other provisions has been satisfied. The use of "must" in a statute expresses a requirement when the subject is a thing, regardless of the verb tense. NRS 0.025(c)(1). "If a statute is clear and unambiguous, we give effect to the plain meaning of the words, without resort to the rules of construction." *Vanguard*, 129 Nev. at 607, 309 P.3d at 1020 (citation omitted). NRCP 4.2(d)(6) is clear that a district court "must" provide a plaintiff additional time to complete the dual service requirement of NRCP 4.2(d)(2) if one of the two entities have been served. Further, NRCP 4.2(d)(6) commands that a district court must provide additional time even absent a motion or request from the plaintiff. *Compare* NRCP 4(e)(3) (discussing that a plaintiff must file a motion for extension of time); *with* NRCP 4.2(d)(6) (no mention of plaintiff's need to file a motion for extension of time, and instead commanding that a district court provide additional time.)

The District Court applied NRCP 4(e)(2) in requiring Harris to complete the dual service requirement of NRCP 4.2(d)(2), despite NRCP 4.2(d)(6). The District

Court's reliance on NRCP 4(e)(2) and disregard of NRCP 4.2(d)(6) was a misconstruction of the Rules. "It is a long-standing rule of statutory construction that where a specific and general statute conflict, the specific statute will take precedence." *Cnty. of Clark v. Howard Hughes Co.*, 129 Nev. 410, 412, 305 P.3d 896, 897 (2013) (quotation marks and citation omitted).

NRCP 4(e)(2) governs the service of complaints in general and has general applicability. On the contrary, NRCP 4.2(d)(6) governs the specific application of service on State employees in accordance with NRCP 4.2(d)(1) and (2). For example, NRCP 4 has general applicability in that in does not require dual service on State employees and the Nevada Attorney General. To the contrary, NRCP 4.2(d) is titled "Serving the State of Nevada. Its Public Entities and Political Subdivisions and Their Officers and Employees." NRCP 4.2(d) governs the specific service of State employees and controls over the general NRCP 4 and is controlling in this case. *See Howard Hughes*, 129 Nev. at 412, 305 P.3d at 897; *see also Lofthouse v. State*, 467 P.3d 609, 613 (Nev. 2020) (explaining that title can be useful in interpreting statute, but it is not dispositive of intent) (citing *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004)).

The District Court incorrectly held that NRCP 4(e)(2) controlled and that it was not required to provide Harris additional time to complete service on the State Defendants, despite his service on the Attorney General's Office. This Court

should thus reverse the District Court's Order dismissing the State Defendants and remand with instruction for it to provide Harris with additional time to serve the State Defendants.

3. ***The District Court abused its discretion in not granting Harris additional time to complete service.***

Even if Harris was not entitled to an automatic grant of additional time to serve the State Defendants or their authorized agent, the District Court abused its discretion in not providing Harris additional time to complete the dual service requirement. NRCP 4(e)(4) provides:

> [i]f a plaintiff files a motion for an extension of time after the 120-day service period — or any extension thereof — expires, the court must first determine whether good cause exists for the plaintiff's failure to timely file the motion for an extension before the court considers whether good cause exists for granting an extension of the service period. If the plaintiff shows that good cause exists for the plaintiff's failure to timely file the motion and for granting an extension of the service period, the court must extend the time for service and set a reasonable date by which service should be made.

In the present case, Harris was under the impression that service of the summons and Complaint on the Nevada Attorney General on behalf of the State Defendants and service of the summons and Complaint on the NDOC satisfied the requirements of NRCP 4.2(d)(2). (Vol. 3, App. 568.)[13] Harris argued that service was completed on December 13 and 16, 2019, 39-42 days after the filing of the

[13] Harris's belief is not unreasonable given AR 357 and its provision that the NDOC is permitted to accept service on behalf of its current employees.

Complaint, and that there was no need for additional time to complete service. (Vol. 3, App. 568.) Harris further argued that he took all necessary steps to complete service, but that even if service was not timely completed, he requested additional time to complete service. (Vol. 3, App. 571.) Instead of providing Harris, a pro se litigant, with information regarding his missteps in service and allowing him an opportunity to correct those errors, the District Court dismissed Harris's Complaint. An unfair result for a pro se litigant who failed to complete the technical steps of dual service for State employees.

In *Scrimer v. Eighth Judicial District Court,* 116 Nev. 507, 516, 998 P.2d 1190, 1196 (2000), this Court listed several factors that a district court should weigh in determining whether good cause exists to extend service after the expiration of the 120-day limit, including: "(1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, … (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant, (8) the prejudice to the defendant caused by the plaintiff's delay in serving process, (9) the defendant's knowledge of the existence of the lawsuit, and (10) any extensions of time for service granted by the district court." 116 Nev. 507, 516, 998 P.2d 1190, 1196 (2000).

Harris arranged to have the State Defendants and the NDOC served on December 13 and 16, 2019, roughly a month after he filed his lawsuit, clearly demonstrating his diligence in attempting service. On the other hand, the State Defendants filed their Motion to Dismiss on June 3, 2020, three months after the expiration of the 120-day limit and six months after the Nevada Attorney General's Office became aware of the lawsuit. The State Defendants waited six months after service on the Attorney General's Office, despite Harris filing a Notice of Motion of Service on February 9, 2020, stating that "all defendants in this matter have either been served or attempts have been made…." (Vol. 1, App. 47.) The State Defendants took no action, instead allowing the 120-day limit to run only to then inform Harris in June that he failed to comply with the technical requirements of NRCP 4.2(d)(2).

Further, the State Defendants did not, and would be hard pressed to, establish prejudice as a result of the Attorney General being served with the Complaint in December 2019, considering the Attorney General represents state employees in suits arising out of their duties. *See* NRS 41.0339(1). In fact, the Attorney General's Office represented Warden Williams, filed a Motion to Dismiss in January 2020 on his behalf, and then represented the State Defendants in June 2020. The State Defendants would not suffer prejudice by an extension of the deadline for Harris to complete the requirement of NRCP 4.2(d)(2)(B).

The facts regarding service clearly demonstrate that the State Defendants sought to take advantage of an incarcerated pro se litigant's inexperience with the technical aspects of the Nevada Rules of Civil Procedure and that good cause existed for Harris to have an extension of time. The Ninth Circuit has recognized there is "a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (citing *Borzeka v. Heckler*, 739 F.2d 444, 447 n. 2 (9th Cir. 1984) (defective service of complaint by pro se litigant does not warrant dismissal)); *see also Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 877 (D.C. Cir. 1993) (remanding to permit pro se plaintiff to perfect service where plaintiff twice attempted service, government defendants had notice of suit and were represented by counsel, and there was a long delay in defendant's response to complaint). Harris, while incarcerated, believed he completed service and should have been given an opportunity by the District Court to correct any deficiencies. The District Court abused its discretion in granting the State Defendants' Motion to Dismiss and reversal is warranted.

CONCLUSION

Appellant Anthony Joseph Harris respectfully requests that this Court reverse the District Court's Order granting Warden Williams's Motion to Dismiss with prejudice, including the granting of qualified immunity, and the District

Court's Order granting the State Defendants' Motion to Dismiss. This case should be reversed and remanded with instructions consistent with the arguments raised herein.

RESPECTFULLY SUBMITTED this 5th day of August, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the 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, and contains 12,776 words.

Finally, I hereby certify that I have read this 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 August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Holland & Hart LLP, and that on December 9, 2020, I electronically filed and served through the Nevada Supreme Court's E-Filing System (Eflex) a true and correct copy of the above and foregoing, addressed to the following:

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ADDENDUM

NEVADA DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE REGULATION
740

INMATE GRIEVANCE PROCEDURE

Supersedes: AR 740 (02/12/10); and AR 740 (Temporary, 06/16/14); 09/16/14; (Temporary, 01/03/17); 03/07/17; 08/30/17
Effective Date: Temporary 11/20/18

AUTHORITY: NRS 209.131, 209.243; 41.031; 41.0322; 41.0375; 42 U.S.C. § 15601, *et seq.* and 28 C.F.R. Part 115

PURPOSE:

The purpose of this Administrative Regulation ("AR") is to set forth the requirements and procedures of the administrative process that Nevada Department of Corrections ("NDOC") inmates must utilize to resolve addressable grievances and claims including, but not limited to, claims for personal property, property damage, disciplinary appeals, personal injuries, and any other tort or civil rights claim relating to conditions of confinement. Inmates may use the Inmate Grievance Procedure to resolve addressable inmate claims only if the inmate can factually demonstrate a loss or harm. This procedure describes the formal grievance processes and will guide NDOC employees in the administration, investigation, response and resolution of inmate grievances. The provisions of this AR shall be effective on or after the effective date of this AR. The provisions of this AR are not retroactive and do not apply to incidents and/or claims that occurred prior to the effective date of this AR. Only inmate claims arising out of, or relating to, issues within the authority and control of the NDOC may be submitted for review and resolution by way of the grievance process. A good faith effort will be made to resolve legitimate inmate claims without requiring the inmate to file a formal grievance. This AR does not create any right, liberty or property interest, or establish the basis for any cause of action against the State of Nevada, its political subdivisions, agencies, boards, commissions, departments, officers or employees.

RESPONSIBILITY

1. The Director, through the Deputy Directors (DDs), shall be responsible in establishing and supervising an inmate grievance process that provides an appropriate response to an inmate's claim, as well as an administrative means for prompt and fair resolution of, inmate problems and concerns.

2. The Deputy Director or designated Administrator shall be responsible for 2nd level grievances.

3. The Warden through the Associate Wardens (AWs) shall be responsible in managing the grievance process at each institution and any facilities under the control of the parent institution. The AW may designate an Inmate Grievance Coordinator to conduct functions

required by this regulation under the AW authority and supervision.

740.01 ADMINISTRATION OF INMATE GRIEVANCES

1. All grievances, whether accepted or not, will be entered into NOTIS.

2. Each institution/facility shall establish locked boxes where all inmates have access to submit their grievances directly to the box. Keys will be issued by the Warden, to an AW and/or a designated staff.

   A. Lock boxes will be maintained in segregation/max units in a manner in which the inmate will be allowed to have direct access. A designated staff may go cell to cell to pick up grievances in segregation /max units due to security and safety concerns, if necessary.

   B. Emergency grievances will be handed to any staff member for immediate processing per this regulation.

3. Grievances will be treated as legal correspondence and will be gathered daily, Monday through Friday, excluding holidays, by the AW or designated Grievance Coordinator(s) and or designated staff member.

4. Grievance forms will be kept in housing units and may be accessed through the unit staff, the unit caseworker or in the Institutional Law Library.

5. Grievances may be GRANTED, DENIED, PARTIALLY GRANTED, ABANDONED DUPLICATE NOT ACCEPTED, OR GRIEVABLE, RESOLVED, SETTLEMENT OR WITHDRAWN or referred to the Investigator General's Office at any level as deemed appropriate after the claim in the grievance has been investigated. PREA grievances shall immediately be referred to the Inspector General. Grievance findings or responses will not be titled "Substantiated."

6. The Grievance Coordinator should record receipts, transmittals, actions, and responses on all grievances to NOTIS within three (3) working days of receipt.

   A. The coordinator should sign, date and enter the approximate time as noted on DOC 3091, 3093 and 3094.

   B. The front page of the grievance should be date stamped the day entered into NOTIS.

7. Monthly and annual grievance reports generated by NOTIS will be reviewed by the Deputy Directors (DDs), Wardens and Associate Wardens (AWs) on a quarterly and annual basis.

740.02 GRIEVANCE RECORDS

1. Grievance documents shall be stored at the facility/institution where the grievance issue occurred. The results of the grievance shall be stored in NOTIS.

A. Grievance files shall be in separate files for each inmate and maintained in alphabetical order.

B. Grievance copies shall not be placed in an inmate's Institutional or Central File, nor shall they be available to employees not involved in the grievance process, unless the employee has a need for the information in the grievance or the responses to the grievance.

2. Grievance files shall be maintained at each institution for a minimum of five (5) years following final disposition of the grievance.

3. Employees who are participating in the disposition of a grievance shall have access to records essential to the disposition of the grievance only.

4. Inmates will not have access to grievance records unless ordered by a court, as grievance records are considered confidential and they may be redacted, if appropriate.

5. Upon completion of each level of the grievance process, the form and copies of all relevant attachments shall be maintained in the inmate's separate grievance file. Originals shall be given to the inmate.

740.03 GRIEVANCE ISSUES

1. Inmates may use the Inmate Grievance Procedure to resolve addressable inmate claims, only if the inmate can factually demonstrate a loss or harm. Grievances may be filed to include, but not limited to, personal property, property damage, disciplinary appeals, personal injuries, and any other tort claim or civil rights claim relating to conditions of institutional life. The inmate must state the action or remedy that will satisfy the claim in the grievance.

   A. If the inmate does not factually demonstrate a loss or harm and does not state the action or remedy that will satisfy the claim in the grievance, the grievance will not be accepted and returned to the inmate with an explanation as to what was missing in order for the grievance to be processed.

   B. A Grievance will not be used as an inmate request form (DOC 3012) to advise staff of issues, actions or conditions that they do not like but suffered no harm or loss.

   C. A Grievance must be legible, with a clearly defined remedy requested.

2. All allegations of inmate abuse by Department staff, employees, agents or independent contractors, shall be immediately reported to the Warden, AWs, and the Inspector General's Office, in accordance with investigator guidelines via the NOTIS reporting system.

A. Any grievance reporting of sexual abuse against an inmate will be referred to the Warden or designee for entry into the NOTIS reporting system and referral to the Office of the Inspector General.

B. Inmates who allege abuse other than sexual abuse will be interviewed by a supervisor of the staff who allegedly committed the abuse to ascertain if he/she agrees to pursue administrative remedies, which will be documented in the NOTIS system.

3. Only inmate claims arising out of, or relating to, issues within the authority and control of the Department may be submitted for review and resolution. Non-grievable issues include:

A. State and federal court decisions.

B. State, federal and local laws and regulations.

C. Parole Board actions and/or decisions.

D. Medical diagnosis, medication or treatment/care provided by a private/contract community hospital.

4. Claims for which the inmate lacks standing will not be accepted, including, but not limited to:

A. Filing a grievance on behalf of another inmate unless the inmate is so physically or emotionally handicapped as to be incapable of filing a grievance, and with the other inmate's approval, or in the case(s) of any third party reporting of Sexual Abuse.

B. The inmate filing the grievance was not a direct participant in the matter being grieved, except a third party allegation of sexual abuse.

C. An inmate may not file more than one (1) grievance per seven (7) day week, Monday through Sunday. More than one (1) grievance filed during the seven day week period will not be accepted, .unless it alleges sexual abuse or it is an emergency grievance that involves health or safety claims.

D. The inclusion of more than one grievance issue, per form will be cause for the grievance to not be accepted.

E. Grievances that have the same issue in a previously filed grievance will not be accepted, even if the requested action or remedy is different on the subsequent grievance.

5. In the event an inmate's claim is not accepted ornot within the intended scope of this Regulation, the inmate may not appeal that decision to the next procedural level.

6. An inmate whose grievance is denied in its entirety may appeal the grievance to the next level, within the substantive and procedural requirements outlined herein, unless the action requested has already been Granted at a lower level.

   A. Administrators or employees of the institution shall automatically allow appeals without interference unless the grievance is granted..

   B. An inmate's election not to sign and date any grievance form at any level shall constitute abandonment of the claim.

   C. If the Grievance is **"Granted"** at any level, the grievance process is considered complete and the inmate's administrative remedies exhausted, and the inmate cannot appeal the decision to a higher level.

7. Time limits shall begin to run from the date an inmate receives a response.

8. An overdue grievance response at any level is not an automatic finding for the inmate.

   A. The response must be completed, even if it is overdue.

   B. The inmate may proceed to the next grievance level, if a response is overdue.

   C. The overdue response does not count against the inmate's timeframe for an appeal if he or she waits for the response before initiating the appeal.

9. Inmates who participate in or utilize the Inmate Grievance Procedure shall not be subjected to retaliation, i.e. an assertion that an employee took some adverse action against an inmate for filing a grievance, except as noted in 740.05, where the action did not reasonably advance a legitimate correctional goal.

   A. Retaliation is a grievable issue.

   B. An unfounded claim of retaliation will be handled as an abuse of the grievance procedure and a disciplinary action may be taken.

10. Comprehensive responses are required for inmate grievances. Statements such as "Your grievance is denied" are not acceptable. An explanation is necessary.

740.04 ABUSE OF THE INMATE GRIEVANCE PROCEDURE

1. Inmates are encouraged to use the Grievance Procedure to resolve addressable claims where the inmate can define a specific loss or harm, however, they are prohibited from abusing the system by knowingly, willfully or maliciously filing excessive, frivolous or vexatious grievances, which are considered to be an abuse of the Inmate Grievance Procedure. Any of the below listed violations will result in the grievance being not accepted and disciplinary action may be taken.

2. It is considered abuse of the inmate grievance procedure when an inmate files a grievance that contains, but is not limited to:

   A. A threat of serious bodily injury to a specific individual.

   B. Specific claims or incidents previously filed by the same inmate.

   C. Filing two (2) or more emergency grievances in a seven (7) day week period, Monday through Sunday which is deemed not to be emergencies may result in disciplinary action against the inmate for abuse of the grievance system. Disciplinary action may be generated by the Warden or designee for abuse of the emergency grievance process.

   D. Obscene, profane, and derogatory language.

   E. Contains more than one (1) appropriate issue, per grievance.

   F. The claim or requested remedy changes or is modified from one level to another.

   G. More than two (2) continuation forms (DOC 3097) per grievance.

   H. Alteration of the grievance forms or continuation forms. This includes writing more than one line, on each line provided on the grievance form.

3. If an inmate files a grievance as listed in (2), the Grievance Coordinator shall:

   A. Return the original improper grievance with a Form DOC-3098, Improper Grievance Memorandum, noting the specific violation.

   B. A copy will be put in the inmate's grievance file.

4. An inmate who satisfies the criteria contained in 740.04 Section 2 above should:

   A. Be brought to the attention of the Grievance Coordinator as soon as possible.

   B. The Grievance Coordinator should review all documentation supporting the alleged abuse to determine if abuse has occurred and forward a written recommendation to the Warden.

   C. If the recommendation is approved the Warden can assign the appropriate level supervisor or administrator to write a Notice of Charges on the inmate.

   D. The supervisor or administrator will forward the Notice of Charges to the Warden for processing through the inmate disciplinary process.

E. A conduct violation of this nature is not a form of retaliation.

F. An inmate may not be disciplined for filing a grievance related to alleged sexual abuse unless the Department has demonstrated that the inmate filed the grievance in bad faith.

G. NDOC will not respond to an improper grievance that results in a DOC-3098 under AR 740.

740.05 REMEDIES TO GRIEVANCES

1. Grievance remedies should be determined with the goal of appropriately resolving legitimate claims at the lowest level of review possible, considering each institution's particular operational, security and safety concerns.

2. Remedies available for grievances may include, but are not limited to, the following:

   A. Resolve unsafe or unsanitary conditions of confinement.

   B. Address the violation of an inmate's constitutional, civil or statutory rights.

   C. Protect inmates from criminal or prohibited acts committed by Departmental employees and staff or other inmates.

   D. Revise, clarify and implement written Departmental and institutional rules or procedures necessary to prevent further violations.

   E. To provide a disabled or physically impaired inmate with reasonable accommodation or reasonable modification.

   F. Monetary reimbursement for property loss, damage, personal injury, tort, or civil rights claims arising out of an act or omission of the Department of Corrections or any of its agents, former officers, employees or contractors.

3. The staff person rendering a decision on a grievance for a proposed monetary remedy may be submitted to the Deputy Director of Support Services who may award monetary damages at any level of the Inmate Grievance. Once approved:

   A. A Form DOC-3096, Administrative Claim Release Agreement, will be completed and submitted by the inmate on all monetary claims, except for personal property damage or loss.

B. A Form DOC-3027, Property Claim Release Agreement, will be completed and submitted by the inmate on all monetary claims for personal property damage or loss.

C. When property claims are settled informally at an institution, DOC-3027 Property Release Agreement will be completed.

4. Compensation for loss of personal property, property damage, personal injury or any other claim arising out of a tort shall not exceed five hundred ($500.00).

740.06 INMATE TRANSFERS

1. Inmates transferred to another institution pending the resolution of a filed grievance shall have the grievance completed at the sending institution at all levels.

   A. The receiving institution is responsible for logging in and tracking the grievance through NOTIS.

   B. All responses and correspondence shall be conducted via first class mail to the Grievance Coordinator at the receiving institution.

2. Timeframes do not apply if the inmate has been transferred. Grievances shall be processed as soon as practicable and timeframes shall be adhered to as closely as possible If an inmate's sentence expires or leaves the Department on parole, the grievance will be finalized on the current level. No further appeal may occur. It is the responsibility of the inmate to provide a forwarding address during the release process in order to receive a grievance response.

740.07 EMERGENCY GRIEVANCE PROCEDURE

1. An emergency shall be considered life threatening for the inmate or a Safety and Security risk for the institution.

2. An Emergency Grievance (Form DOC-1564) received by any staff member shall be immediately delivered to the nearest supervisor no later than is reasonable and necessary to prevent serious injury or a breach of security. The Emergency Grievance shall be reviewed within 24-hours of receipt and documented in NOTIS.

3. Any emergency grievance alleging that an inmate is subject to substantial risk of imminent sexual abuse shall be immediately forwarded to the highest ranking staff member on duty so that corrective action may be taken immediately which may include moving the inmate to administrative segregation for protective custody.

   A. The inmate shall receive a response to the emergency grievance within 24-hours, with a final facility decision about whether the inmate is in substantial risk of imminent sexual abuse within two (2) regular calendar days.

B. The response, final decision and the action taken in response to the emergency grievance will be documented. Action taken can include, but is not limited to:

(1) Refer the information to the Inspector General's Office;

(2) Afford the inmate appropriate medical, mental health care; and

(3) Address any safety considerations.

4. The shift supervisor may confer with the on duty medical staff, Warden or Associate Warden, to determine whether the grievance constitutes an emergency.

5. The highest-ranking staff member on duty, with the aid of an authorized Department official, shall immediately take any corrective measures necessary to prevent a substantial risk of injury or breach of security.

6. The Department official receiving the Emergency Grievance should respond to the filing inmate no later than is necessary to prevent serious injury or a breach of security.

7. In the event the inmate requests further review of a claim not deemed an emergency, the inmate may file a grievance appeal commencing at the Informal Level.

8. A copy of the emergency grievance will be forwarded to the Grievance Coordinator for entry into NOTIS for processing and tracking purposes.

740.08 INFORMAL GRIEVANCE

1. At the Informal Level, an inmate shall file a grievance (Form DOC-3091) after failing to resolve the matter by other means such as discussion with staff or submitting an inmate request form (DOC 3012).

2. Grievances should be reviewed, investigated and responded to by the Department Supervisor that has responsibility over the issue that is being grieved or designated person.

A. High Risk Prisoner (HRP) status. HRP is a high risk potential offender that creates risk to inmates and staff.

(1) Informal Level grievances will be responded to by the Warden or designee.

(2) First Level grievances will be responded to by the Deputy Director or designee.

(3) Second level grievances will be responded to by the Director or designee.

B. Informal grievances addressing medical or dental issues should be responded to by a charge nurse or designee of the Director of Nursing at the institution.

C. Informal grievances addressing mental health issues should be responded to by the Psychologist III, or Mental Health Supervisor at each facility.

D. If the person who would normally respond to a grievance is the subject of the grievance, the Supervisor over the person should respond to the Informal Grievance.

3. The response to the grievance should be substantial, referencing all policies, procedures, rationale, and/or circumstances in finding for or against the inmate.

4. The inmate shall file an informal grievance within the time frames noted below:

A. Within six (6) months, in compliance with NRS 209.243, if the issue involves personal property damage or loss, personal injury, medical claims or any other tort claims, including civil rights claims.

B. Within ten (10) calendar days if the issue involves any other issues within the authority and control of the Department including, but not limited to, classification, disciplinary, mail and correspondence, religious items, and food.

C. When a grievance cannot be filed because of circumstances beyond the inmate's control, the time will begin to start from the date in which such circumstances cease to exist.

D. Time frames are waived for allegations of sexual abuse regardless of when the incident is alleged to have occurred.

5. An inmate shall use Form DOC-3097, Grievant Statement Continuation Form, if unable to present the details of their claim in the space provided, limited to two continuation form pages ora maximum of twon continuation form pages. All documentation and factual allegations available to the inmate must be submitted at this level with the grievance.

6. All grievances submitted should also include the remedy sought by the inmate to resolve this claim. Failure to submit a remedy will be considered an improper grievance and shall not be accepted.

7. If the inmate's remedy to their grievance includes monetary restitution or damages, then the inmate will get the following forms from unit staff, unit caseworker, or law libraries:

A. Form DOC-3026, Inmate Property Claim, which shall be completed and submitted in addition to the grievance for all property loss or damage claims.

B. Form DOC-3095, Administrative Claim Form, which shall be completed and submitted in addition to the grievance for all personal injury, tort, or civil rights claims.

8. Failure by the inmate to submit a proper Informal Grievance form to the Grievance Coordinator or designated employee, within the time frame noted in 740.08, number 4, shall constitute abandonment of the inmate's grievance at this, and all subsequent levels.

   A. When overdue grievances are received, they will be logged into NOTIS.

   B. The grievance response Form DOC-3098 will note that the inmate exceeded the timeframe and no action will be taken.

9. If the issue raised is not grievable, or the grievance is a duplicate of a prior grievance, the Grievance Coordinator will return the grievance to the inmate with Form 3098 noting the reason.

10. The inmate shall file an Informal Grievance form that states "for tracking purposes" when an issue goes directly to the Warden (first level) for a decision such as disciplinary appeals, visiting denials, any allegation of sexual abuse or mail censorship.

11. Grievances alleging staff misconduct pursuant to *Administrative Regulation (AR) 339 "Employee Ethics and Conduct, Corrective or Disciplinary Action, and Prohibitions and Penalties"* will be reviewed by the Warden and if deemed appropriate will be forwarded to the Office of the Inspector General through NOTIS.

   A. The Informal Response will reflect this action being initiated.

   B. The Inspector General's Office will have 90 calendar days to respond to this allegation.

12. The time limit for a response to the informal grievance is forty-five (45) calendar days from the date the grievance is received by the grievance coordinator to the date returned to the inmate.

   A. The inmate must file an appeal within five (5) calendar days of receipt of the response to proceed to the next grievance level.

   B. Transmission of the grievance to another institution may result in exceeding this timeframe.

740.09 FIRST LEVEL GRIEVANCE

1. A First Level Grievance (Form DOC-3093) should be reviewed, investigated and responded to by the Warden at the institution where the incident being grieved occurred, even if the Warden is the subject of the grievance.

   A. The Warden may utilize any staff in the development of a grievance response. The grievance will be responded to by a supervisor that has authority over the issue claimed in the grievance.

B. First Level medical/dental issues should be responded to by the highest level of Nursing Administration at the institution (DONs I or II).

C. First Level mental health issues should be responded to by the Psychologist IV or highest ranking Psychologist at the institution.

D. First Level property issues should be responded to by the Associate Warden of Operations.

2. All grievances containing allegations of sexual abuse will be referred to the Inspector General's Office for investigation.

A. Allegations of sexual abuse will not be referred to a staff member who is the subject of the accusation of sexual abuse.

B. The Inspector General's Office shall make a final decision on the merits of any portion of the sexual abuse grievance within 90 calendar days of the initial filing of the grievance and if applicable the matter assigned for official investigation.

C. The Inspector General's Office may claim an extension of time to respond to a sexual abuse grievance of up to an additional 70 calendar days if the normal time period for response is insufficient to make an appropriate decision.

D. The Inspector General's Office shall notify the inmate in writing of any such extension and provide a date by which a decision will be made.

E. Upon the completion of the investigation into sexual abuse the inmate shall be informed of the outcome of the investigation by the Inspector General's Office.

3. At this level the inmate shall provide a justification to continue to the first level.

4. A First Level Grievance that does not comply with procedural guidelines shall be returned to the inmate, with instructions using Form DOC-3098.

A. Third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates shall be permitted to assist inmates in filing a grievance(s) relating to allegations of sexual abuse.

B. If a third party files on behalf of the inmate, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf.

C. If a third party files on behalf of the inmate, the facility may also require as a condition of processing the grievance, the alleged victim to personally pursue any subsequent steps in the grievance process.

5. The time limit for a response to the inmate for the First Level grievance is forty-five (45) calendar days from the date the grievance is received by the grievance coordinator to the date returned to inmate.

A. The inmate must file an appeal within five (5) calendar days of receipt of the response to proceed to the next grievance level.

B. Transmission of the grievance to another institution may result in exceeding this timeframe.

740.10 SECOND LEVEL GRIEVANCE

1. A Second Level Grievance (Form DOC - 3094) should be reviewed and responded to by the:

A. Deputy Director of Operations for facility custody or security operations that do not include programs.

B. Deputy Director of Programs for all program issues such as education, visiting, or religious programming.

C. The Deputy Director of Support Services for fiscal, property and telephone issues.

D. The Offender Management Administrator (OMA) for classification and timekeeping issues.

E. The Medical Director for medical/ dental issues, including medical co-pays or charges.

F. The Mental Health Director for mental health issues.

G. The inmate may appeal the decision related to a sexual abuse grievance response from the Inspector General's Office within five (5) calendar days of the grievance, with a subsequent response from the Deputy Director for security, program, religious and operations.

2. The Grievance Coordinator shall forward copies of all related documents and the appeal to the Deputy Director for review and distribution to other Appointing Authorities and Division Heads.

3. The time limit for a response to the inmate for the Second Level grievance is sixty (60) calendar days, not including transmittal time, from the date the grievance is received by the grievance coordinator to the date it is returned to inmate.

4. Administrators shall respond to the Second Level Grievance, specifying the decision and the reasons for the decision, and return it to the Grievance Coordinator.

APPLICABILITY

1. This regulation requires an operational procedure for each institution and facility.

2. This regulation requires an audit.

REFERENCES

ACA Standards, 4th Edition and 2008 Supplement, 4-4105, 4-4276, 4-4284, 4-4344, 4-4394, 4-4429, 4-4429-1

James Dzurenda, Director

11/20/18
Date

NEVADA DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE REGULATION
357

SUMMONS AND COMPLAINT SERVICE OF PROCESS

Supersedes: (Temporary, 10/26/11); 06/17/12; (Temporary, 07/20/17)
Effective date: 08/30/17

AUTHORITY: NRS 209.131, 41.0339

PURPOSE

To ensure Nevada Department of Corrections is compliant with state regulations and has an identified procedure for implementation of summons and complaint service processes.

RESPONSIBILITY

The Deputy Director of each respective division shall be responsible for the overall implementation and compliance with this regulation.

The Human Resources Division shall be responsible for the implementation of this regulation.

All employees shall be responsible to have knowledge of and comply with this regulation.

357.01 DESIGNATED REPRESENTATIVE

1. Only those employees designated below are authorized to accept service on behalf of the Department and its employees.

   A. Designated Administrative Assistants in Human Resources.

   B. Warden's Administrative Assistants located at Lovelock Correctional Center and Ely State Prison, based on the rural location and limitation of on-site staff.

   C. Department Personnel Officers.

2. Personal service to an individual employee is proper and cannot be refused, but constitutes appropriate service for that person only.

3. Service shall not be accepted for defendants who are not current employees of the Department.

357.02 EMPLOYEES REQUEST FOR LEGAL REPRESENTATION CIVIL LITIGATION COORDINATION FORM III (DOC-1034)

1. NRS 41.0339 requires an employee submit a written request for defense to the Attorney General's Office within 15-days after service of a Summons and Complaint.

2. Failure to respond may result in an employee not being represented by the Attorney Generals Office.

3. Critical time limitations apply to each step of this process. Failure to satisfy these deadlines can result in a default judgment against the employee.

4. Upon receipt of a properly served Summons and Complaint the Designated Representative shall log the Summons and Complaint.

357.03 ACCEPTANCE OF SERVICE BY A REPRESENTATIVE

1. A complaint must always be accompanied by a summons, or service shall not be accepted.

2. The original Summons and Complaint will be forwarded to the Attorney General's Office in Carson City.

A. It will be accompanied by a "Notice To Attorney General Regarding Service of Process Civil Litigation Coordination Form I" (DOC-1032).

B. These documents must be forwarded within two (2) business days.

3. The Attorney General's Office will return a copy of the Summons and Complaint, along with a letter addressed to each defendant, to the Designated Representative.

A. The Designated Representative will forward the letter and copy of the Summons and Complaint along with an original "Employees Request for Legal Representation Civil Litigation Coordination Form III" (DOC-1034), to the employee.

B. The Summons and Complaint package shall be transmitted, by intra-department mail to the institution where the defendant is currently located, to the attention of the Warden's Assistant.

C. The Warden's Assistant will ensure the DOC-1034 is signed by the employee and returned to the Designated Representative.

D. The Designated Representative will log the date the DOC-1034 is returned to and forward to the Attorney General's Office in Carson City.

357.04 ACCEPTANCE OF SERVICE BY CURRENT OR FORMER EMPLOYEE

1. If a current or former employee is served personally, the current or former employee shall immediately notify the Designated Representative in their region.

   A. Personal service to an individual current or former employee is proper and cannot be refused.

   B. That current or former employee shall not accept service for any other current or former employees.

2. For personal service, individual employees are reminded that NRS 41.0339 requires that current or former employee names as a defendant in a civil complaint submit a written request for representation to the Attorney General within 15 days of service of a Summons and Complaint and timely notification of designated employees is essential.

   A. Failure to satisfy those deadlines may result in a default judgment against the employee.

   B. Failure to timely submit a request for representation may result in current or former employee being left without representation by the Nevada State Attorney General's Office.

357.05 RECORDS AND LOGS

1. All documents and logs generated by this regulation shall be maintained pursuant to normal records retention schedule.

APPLICABILITY

1. This regulation applies to all employees of the Department.

2. This regulation does not require an Operational Procedure.

3. This regulation does not require an audit.

James Dzurenda, Director

8/30/17
Date

N.R.C.P. 4.2

Current through rules promulgated and effective as of May 1, 2021

NV - Nevada Local, State & Federal Court Rules > RULES OF CIVIL PROCEDURE FOR THE NEVADA DISTRICT COURTS > II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 4.2. Service Within Nevada

(a) ***Serving an Individual.*** Unless otherwise provided by these rules, service may be made on an individual:

(1) by delivering a copy of the summons and complaint to the individual personally;

(2) by leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with a person of suitable age and discretion who currently resides therein and is not an adverse party to the individual being served; or

(3) by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(b) ***Serving Minors and Incapacitated Persons.***

(1) ***Minors.*** A minor must be served by delivering a copy of the summons and complaint:

(A) if the minor is 14 years of age or older, to the minor; and

(B) to one of the following persons:

(i) if a guardian or similar fiduciary has been appointed for the minor, to the fiduciary under Rule 4.2 (a), (c), or (d), as appropriate for the type of fiduciary;

(ii) if a fiduciary has not been appointed, to the minor's parent under Rule 4.2 (a); or

(iii) if neither a fiduciary nor a parent can be found with reasonable diligence:

(a) to an adult having the care or control of the minor under Rule 4.2 (a); or

(b) to a person of suitable age and discretion with whom the minor resides.

(2) ***Incapacitated Persons.*** An incapacitated person must be served by delivering a copy of the summons and complaint:

(A) to the incapacitated person; and

(B) to one of the following persons:

(i) if a guardian or similar fiduciary has been appointed for the incapacitated person, to the fiduciary under Rule 4.2 (a), (c), or (d), as appropriate for the type of fiduciary; or

(ii) if a fiduciary has not been appointed:

(a) to a person of suitable age and discretion with whom the incapacitated person resides;

(b) if the incapacitated person is living in a facility, to the facility under Rule 4.2, as appropriate for the type of facility; or

(c) to another person as provided by court order.

(c) ***Serving Entities and Associations.***

(1) ***Entities and Associations in Nevada.***

(A) An entity or association that is formed under the laws of this state, is registered to do business in this state, or has appointed a registered agent in this state, may be served by delivering a copy of the summons and complaint to:

(i)the registered agent of the entity or association;

(ii)any officer or director of a corporation;

(iii)any partner of a general partnership;

(iv)any general partner of a limited partnership;

(v)any member of a member-managed limited-liability company;

(vi)any manager of a manager-managed limited-liability company;

(vii)any trustee of a business trust;

(viii)any officer or director of a miscellaneous organization mentioned in NRS Chapter 81;

(ix)any managing or general agent of any entity or association; or

(x)any other agent authorized by appointment or by law to receive service of process.

(B) If an agent is one authorized by statute and the statute so requires, a copy of the summons and complaint must also be mailed to the defendant entity or association at its last-known address.

(2) ***Other Foreign Entities and Associations.***A foreign entity or association that cannot be served under Rule 4.2 (c)(1) may be served by delivering a copy of the summons and complaint to any officer, director, partner, member, manager, trustee, or agent identified in Rule 4.2 (c)(1) that is located within this state.

(3) ***Service via the Nevada Secretary of State.***

(A) If, for any reason, service on an entity or association required to appoint a registered agent in this state or to register to do business in this state cannot be made under Rule 4.2 (c)(1) or (2), then the plaintiff may seek leave of court to serve the Nevada Secretary of State in the entity's or association's stead by filing with the court an affidavit:

(i)setting forth the facts demonstrating the plaintiffs good faith attempts to locate and serve the entity or association;

(ii)explaining the reasons why service on the entity or association cannot be made; and

(iii)stating the last-known address of the entity or association or of any person listed in Rule 4.2 (c)(1), if any.

(B) Upon court approval, service may be made by:

(i)delivering a copy of the summons and complaint to the Nevada Secretary of State or his or her deputy; and

(ii)posting a copy of the summons and complaint in the office of the clerk of the court in which such action is brought or pending.

(C) If the plaintiff is aware of the last-known address of any person listed in Rule 4.2 (c)(1), the plaintiff must also mail a copy of the summons and complaint to each such person at the person's last-known address by registered or certified mail. The court may also order additional notice to be sent under Rule 4.4 (d) if the plaintiff is aware of other contact information of the entity or association or of any person listed in Rule 4.2 (c)(1).

(D) Unless otherwise ordered by the court, service under Rule 4.2 (c)(3) may not be used as a substitute in place of serving, under Rule 4.3 (a), an entity or association through a person listed in Rule 4.2 (c)(1) whose address is known but who lives outside this state.

(E) The defendant entity or association must serve a responsive pleading within 21 days after the later of:

(i) the date of service on the Nevada Secretary of State and posting with the clerk of the court; or

(ii) the date of the first mailing of the summons and complaint to the last-known address of any person listed in Rule 4.2 (c)(1).

(d) ***Serving the State of Nevada, Its Public Entities and Political Subdivisions, and Their Officers and Employees.***

(1) ***The State and Its Public Entities.*** The State and any public entity of the State must be served by delivering a copy of the summons and complaint to:

(A) the Attorney General, or a person designated by the Attorney General to receive service of process, at the Office of the Attorney General in Carson City; and

(B) the person serving in the office of administrative head of the named public entity, or an agent designated by the administrative head to receive service of process.

(2) ***State Officers and Employees.*** Any current or former public officer or employee of the State who is sued in his or her official capacity or his or her individual capacity for an act or omission relating to his or her public duties or employment must be served by delivering a copy of the summons and complaint to:

(A) the Attorney General, or a person designated by the Attorney General to receive service of process, at the Office of the Attorney General in Carson City; and

(B) the current or former public officer or employee, or an agent designated by him or her to receive service of process.

(3) ***Political Subdivisions and Their Public Entities.*** Any county, city, town, or other political subdivision of the State, and any public entity of such a political subdivision, must be served by delivering a copy of the summons and complaint to the presiding officer of the governing body of the political subdivision, or an agent designated by the presiding officer to receive service of process.

(4) ***Local Officers and Employees.*** Any current or former public officer or employee of any county, city, town, or other political subdivision of the State, or any public entity of such a political subdivision, who is sued in his or her official capacity or his or her individual capacity for an act or omission relating to his or her public duties or employment must be served by delivering a copy of the summons and complaint to the current or former public officer or employee, or an agent designated by him or her to receive service of process.

(5) ***Statutory Requirements.*** A party suing the State, its public entities or political subdivisions, or their current or former officers and employees must also comply with any statutory requirements for service of the summons and complaint.

(6) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4.2 (d)(1) or (2), if the party has served the Attorney General; or

(B) serve the Attorney General under Rule 4.2 (d)(1) or (2), if the party has served the required person.

History

Amended eff. 3-1-19; Amended eff. 3-26-19

Annotations

Commentary

COMMENT

EFFECT OF AMENDMENT. --

Advisory Committee Note -- 2019 Amendment. -- Subsection (a). Rule 4.2(a) restyles NRCP 4(d)(6) to track *FRCP 4(e)(2)*. Rule 4.2(a)(2) specifies that a summons and complaint may not be delivered to a person of suitable age and discretion who resides with the individual being served if the person is a party to the litigation adverse to the individual being served. This makes unavailing the practice of having a plaintiff in a divorce action accept service on behalf of the spouse with whom he or she still resides.

Subsection (b). Rule 4.2(b) amends former NRCP 4(d)(3) and (4) for service on minors and incapacitated persons. NRS Chapter 129 generally defines a "minor" to be a person under 18 years of age unless emancipated. To serve a minor who is 14 years of age or older, Rule 4.2(b)(1)(A) requires personal service of the summons and complaint on the minor and, also, service on the person designated by Rule 4.2(b)(1)(B).

Rule 4.2(b)(2) similarly amends the procedure for serving an incapacitated person. The rule requires personal service of the summons and complaint on the incapacitated person and, in addition, service of the summons and complaint on the incapacitated person's guardian or fiduciary, if one has been appointed, or other person specified in the rule. Rule 4.2(b)(2) only applies when the person being served has already been declared incapacitated under applicable law; service on a person not yet declared incapacitated should be made under Rule 4.2(a). The change in terminology from "incompetent" to "incapacitated" is stylistic, not substantive.

Subsection (c). The amendments to Rule 4.2(c) encompass all business entities, associations, and other organizations. Rule 4.2(c)(1) generally restates former NRCP 4(d)(1), but also incorporates provisions from *FRCP 4(h)(1)(B)*. Rule 4.2(c)(1) applies to any Nevada entity or association and any foreign entity or association that has registered to do business in Nevada or has appointed a registered agent in Nevada. Rule 4.2(c)(2) applies to foreign entities or associations generally.

Rule 4.2(c)(3) revises the second half of former NRCP 4(d)(1) and governs service on the Nevada Secretary of State when an entity or association cannot otherwise be served. Secretary of State service only applies when a Nevada or foreign entity or association is required by law to appoint a registered agent in Nevada or to register to do business in Nevada. Service on the Nevada Secretary of State now requires court approval and incorporates new alternative notice provisions in Rule 4.4(d).

Subsection (d). Rule 4.2(d) amends former NRCP 4(d)(5) and addresses service on government entities and their officers and employees. Waiver of service under Rule 4.1 does not apply to government entities and persons subject to service under Rule 4.2(d).

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