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SUPREME COURT OF NEVADA

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STATE OF NEVADA,

Petitioner.

v.

BRECK SMITH,

Respondents.

NO.: 82696

**APPELLEE'S REPLY IN SUPPORT
OF MOTION TO DISMISS APPEAL
FOR LACK OF SUBJECT MATTER
JURISDICTION**

COMES NOW, Appellee BRECK SMITH, by and through his attorneys of record, Michael J. McAvoy-Amaya, Esq., and Timothy E. Revero, Esq., hereby submits this Reply in Support of Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction.

Dated this 10th day of May, 2021.

/s/ Michael J. McAvoy-Amaya

MICHAEL J. MCAVOYAMAYA, ESQ.

Nevada Bar No.: 14082

Attorney for Appellee

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

Appellants advance a single argument for why their appeal should not be dismissed pursuant to NRAP 4(1)(1). According to Appellants, NRS 34.830(3) prescribes a different period of time for the filing of the Notice of Appeal. *See* Appellants' Resp., at 3. According to Appellants, "Under NRS 34.830(3), the clerk of the court must prepare a notice establishing the starting period to appeal and the notice provides that "if you wish to appeal, you must file a notice of appeal with the clerk of this court within 33 days after the date this notice is mailed to you." As NRS 34.830(3) provides a different period, Appellant must follow this statute for their notice of appeal to be timely." *Id.* However, NRS 34.830 is quite specific in its terms, and when the Notice referenced in subsections 2 and 3 is required. NRS 34.830(1) provides that "[a]ny order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." *See* Nev. Rev. Stat. 34.830(1). When the order referenced in NRS 34.830(1) orders the "discharging the petitioner from the custody or restraint under which the petitioner is held, committing the petitioner to the custody of another person, dismissing the petition or denying the requested relief," "A copy of any decision or order...must be served by the clerk of the court upon the petitioner and the petitioner's counsel, if any, the respondent, the Attorney General and the district attorney of the county in which the petitioner was convicted." *See* Nev. Rev. Stat. 34.830(2). Only when "a decision or order described in this section is entered by the district court, the clerk of the court shall prepare a notice in substantially the following form and mail a copy of the notice to each person listed in subsection 2." *See* Nev. Rev. Stat. 34.830(2).

The present case did not involve a petition for habeas corpus seeking the discharge of the petitioner from custody or restraint, the committing of the petitioner to the custody of another person. Further, the District Court's order is not one dismissing the petition or denying the request relief. Rather, the petition at issue in this case sought recalculation of Petitioner's time served. The order entered by the District Court granted the petition. Further, NRS 34.839(3) does not prescribe any time period for taking an appeal. Rather, the section simply states that the clerk "prepare a

1 notice in the following form,” and then give an example of what the notice should look like. *See*
2 Nev. Rev. Stat. § 34.830(3). The example of what the notice should look like included in this
3 statute does not extend the deadline for a party to file a Notice of Appeal. *Id.* Further, when read
4 as a whole, it is clear that this statute is intended to apply to situations when the petition seeks
5 discharge or commission to custody, and the order denies the requested relief. *Id.* The notice gives
6 pro se defendants seeking habeas relief additional time to appeal the denial of a petition for habeas
7 corpus. *Id.*

8 Here, Petitioner did not seek discharge from custody, and the relief was granted. As such,
9 regardless of the notice issued by the clerk, the State’s deadline to file the Notice of Appeal was
10 the date the order was served. *See* Nev. R. App. P. 4(a)(1). It is undisputed that “the District Court
11 entered a findings of fact and conclusion of law and order on February 17, 2021.” *See* Appellant’s
12 Resp., at 3. It is undisputed that Appellants received service of that order on February 17, 2021.
13 *Id.* Because NRS 34.830 does not actually prescribe a separate deadline, both in its clear languages,
14 and under the facts of this case, NRAP 4 applies, and this Court lacks jurisdiction to address this
15 appeal.

16 CONCLUSION

17 Therefore, based on the foregoing, Petitioner respectfully request this Court DISMISS
18 Appellants’ appeal for lack of subject matter jurisdiction.

19 Dated this 10th day of May 2021.

20 /s/ Michael J. McAvoy-Amaya, Esq.

21 _____
22 MICHAEL J. MCAVOY-AMAYA, ESQ.

23 Nevada Bar No.: 14082

24 *Attorney for Appellee*
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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that I am an employee of and that on May 10, 2021, I caused the foregoing document entitled **REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules. Non-parties will be served by mail.

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Dated this 10th day of May, 2021.

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