

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 83152

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Elizabeth A. Brown
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DENNIS GRIGSBY

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from a Dismissal of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Kathleen Delaney, District Court Judge
District Court Case No. A-20-821932-W

APPELLANT'S OPENING BRIEF

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Dennis Grigsby:

/s/ Christopher R. Oram

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1 **IV. JURISDICTIONAL STATEMENT**

2 On September 25, 2020, Appellant Dennis Grigsby filed a Petition for Writ
3 of Habeas Corpus in the Eighth Judicial District Court, in Clark County, Nevada.
4 The District Court did not appoint counsel for Mr. Grigsby. The District Court
5 summarily dismissed Mr. Grigsby’s Petition on June 16, 2021. On July 15, 2021,
6 the District Court filed its Findings of Fact, Conclusions of Law and Order. On
7 July 19, 2021, the District Court filed the Notice of Entry of Findings of Fact,
8 Conclusions of Law and Order. Mr. Grigsby filed a timely Notice of Appeal on
9 June 29, 2021.
10

11 This Court has jurisdiction over this appeal of the District Court’s
12 dismissal of post-conviction claims under NRS 34.575.
13

14 **V. ROUTING STATEMENT**

15 Pursuant to the Nevada Rules of Appellate Procedure (hereinafter,
16 “NRAP”) 17(b), the Supreme Court may assign this case to the Court of Appeals.
17

18 **VI. STATEMENT OF THE ISSUES**

- 19 A. Whether the District Court abused its discretion by finding that Mr.
20 Grigsby’s Petition was procedurally barred under NRS 34.726 and NRS
21 34.810 when Mr. Grigsby established good cause and prejudice to overcome
22 the procedural bars.
- 23 B. Whether the District Court abused its discretion by granting the State’s plea
24 for dismissal under the doctrine of laches.
- C. Whether the District Court abused its discretion by finding that Mr.
Grigsby waived his claims by failing to raise them on direct appeal.

1 D. Whether the District Court abused its discretion by finding that Mr.
2 Grigsby was not entitled to the appointment of counsel.

3 E. Whether the District Court abused its discretion by not granting Mr. Grigsby
4 an evidentiary hearing.

5 **VII. STATEMENT OF THE CASE**

6 On August 11, 2008, the State of Nevada charged Appellant Dennis
7 Grigsby by way of Information with one count of Murder with Use of a Deadly
8 Weapon and one count of Possession of a Firearm by Ex-Felon. (A.A. Vol. 1, pg.
9 1). The State filed an Amended Information on January 26, 2009, and removed the
10 charge of Possession of a Firearm by Ex-Felon. (A.A. Vol. 1, pg. 4).

11 The case proceeded to trial from on January 26, 2009 through February 5,
12 2009. The jury found Mr. Grigsby guilty of murder on February 4, 2009. (A.A.
13 Vol 1, pgs. 14). The State then filed a Second Amended Information charging Mr.
14 Grigsby with Possession of a Firearm by Ex-Felon. (A.A. Vol. 1, pg. 12-13). The
15 jury found Mr. Grigsby guilt of Possession of a Firearm by Ex-Felon. (A.A. Vol.
16 1, pg. 15). At the penalty hearing, the jury sentenced Mr. Grigsby to Life in prison
17 without the possibility of parole for the murder charge. (A.A. Vol. 1, pg. 16).
18

19 The District Court sentenced Mr. Grigsby as follows: Count 1- Life without
20 the possibility of parole, plus a consecutive term of sixty (60) to two hundred forty
21 (240) months in the Nevada Department of Corrections for the use of a deadly
22 weapon; and Count 2- sixteen (16) to seventy-two (72) months, Count 2 to run
23
24

1 concurrently to Count 1, with three hundred and thirty (330) days of credit for
2 time served. (A.A. Vol. 1, pg. 21-22). The District Court filed the Judgment of
3 Conviction on April 6, 2009. (A.A. Vol. 1, pg. 21-22).

4 Mr. Grigsby filed a Notice of Appeal on April 14, 2009. (A.A. Vol. 1, pg. 23-
5 24). This Court affirmed the Judgment of Conviction.

6
7 On January 20, 2012, Mr. Grigsby filed a Proper Person Petition for Writ of
8 Habeas Corpus. (A.A. Vol. 1, pg. 25-50). After lengthy briefing and without an
9 evidentiary hearing, the District Court denied Mr. Grigsby's claims. The District
10 Court filed its Findings of Fact, Conclusions of Law and Order on July 30, 2015
11 (A.A. Vol. 1, pg. 51-63), and it filed the Notice of Entry of Findings of Fact,
12 Conclusions of Law and Order on August 4, 2015. (A.A. Vol. 1, pg. 64-77).

13
14 Mr. Grigsby appealed the District Court's denial of his claims. (A.A. Vol. 1,
15 pg. 78-81). This Court affirmed the District Court's decision on June 17, 2016. (A.A.
16 Vol. 1, pg. 86-94).

17 On September 25, 2020, Mr. Grigsby filed a second Petition for Writ of
18 Habeas Corpus, Motion for Appointment of Habeas Corpus Counsel, and Request
19 for Evidentiary Hearing. (Record on Appeal "ROA," pg. 7, 26). This is the
20 Petition at issue here on appeal. Mr. Grigsby supplemented the Petition on March
21 31, 2021. (ROA, pg. 35). The State responded on April 30, 2021. (ROA, pg. 41).
22 On June 9, 2021, Mr. Grigsby filed an Affidavit in Support of his Petition. (ROA,
23
24

1 pg. 57). On June 16, 2021, Mr. Grigsby filed a Reply in Answer to Respondent's
2 Response and Motion to Dismiss his Petition, and he filed a supplement on June
3 17, 2021. (ROA, pg. 68, 108). The District Court orally dismissed his Petition on
4 June 16, 2021 (ROA, pg. 206), and it filed the Findings of Fact, Conclusions of
5 Law and Order on July 15, 2021. (ROA, pg. 168).

7 Mr. Grigsby filed a timely Notice of Appeal on June 29, 2021. (ROA, pg.
8 162). On July 26, 2021, Mr. Grigsby filed a Proper Person Informal Brief. (Docket
9 Entry 21-21585). This Court then directed transmission of the Record on Appeal
10 because Mr. Grigsby filed his appeal in proper person. The District Court
11 transmitted the Record on Appeal to this Court. On September 28, 2021, Counsel
12 for Appellant filed a Notice of Appearance. (Docket Entry 21-27931). The Court
13 approved Counsel's appearance and directed full briefing of this appeal. (Docket
14 Entry 21-28203). Mr. Grigsby now submits this Opening Brief in support of his
15 issues on appeal.
16

17 **VIII. STATEMENT OF FACTS**

18 A jury convicted Mr. Grigsby for shooting and killing Anthony Davis on
19 April 2, 2008, and for possessing a firearm as an ex-felon.
20

21 The facts applicable to this appeal arise from the jury poll that occurred on
22 February 4, 2009. (A.A. Vol. 1, pg. 6-11). When the jury presented its verdict, the
23 Trial Court polled the jurors. Instead of polling all twelve jurors, the Court only
24

1 polled ten out of the twelve. (A.A. Vol. 1, pg. 9). The record does not show a
2 polling of Juror Number 4 and Juror Number 9. (A.A. Vol. 1, pg. 9).

3 **IX. SUMMARY OF THE ARGUMENT**

4 This appeal arises from the dismissal of Mr. Grigsby's claims involving his
5 constitutional rights to due process, right to a fair trial, and right to effective
6 assistance of counsel. The District Court summarily dismissed Mr. Grigsby's
7 claims as procedurally barred and prejudicial to the State under the doctrine of
8 laches. The District Court further refused to appoint counsel for Mr. Grigsby to
9 assist him in developing his claims. Finally, the District Court summarily
10 dismissed the claims without holding an evidentiary hearing. In taking each of
11 these actions, the District Court abused its discretion.
12

13
14 Despite having raised the claims in a second petition past the one year time
15 bar, Mr. Grigsby showed good cause and prejudice to overcome the procedural
16 bars. Furthermore, dismissal of Mr. Grigsby's claims without consideration on
17 the merits based upon the doctrine of laches amounted to a fundamental
18 miscarriage of justice.
19

20 Mr. Grigsby hereby requests that this Court reverse the District Court's
21 order and remand the case to allow Mr. Grigsby to proceed with counsel and to
22 present his claims on the merits.
23
24

X. ARGUMENT

1. Standard of Review

In reviewing findings of fact, this Court reviews the District Court's determinations for an abuse of discretion. *State v. Smith*, 131 Nev. 628, 630, 356 P.3d 1092 (2015). This Court has held, "Generally, a district court's findings of fact with respect to claims of ineffective assistance of counsel are entitled to deference upon appellate review." *Hill v. State*, 114 Nev. 169, 175, 953 P.2d 1077 (1998).

2. The District Court abused its discretion by finding that Mr. Grigsby's Petition was procedurally barred under NRS 34.726 and NRS 34.810 because Mr. Grigsby established good cause and prejudice to overcome the procedural bars.

In the District Court's Findings of Fact, Conclusions of Law, and Order, the District Court found that Mr. Grigsby's Petition to be procedurally barred under both NRS 34.726 and NRS 34.810. The District Court summarily dismissed Mr. Grigsby's Petition.

To excuse procedural bars under both NRS 34.726 and NRS 34.810, a petitioner must show that he did not cause the delay and that dismissal of the petition would cause undue prejudice. *See*, NRS 34.726; NRS 34.810; *State v. Eighth Judicial Dist. Court ex rel. County of Clark*, 121 Nev. 225, 232, 112 P.3d 1070 (2005); *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521 (2003). The Nevada Supreme Court has defined "good cause" as "a substantial reason; one that affords

1 a legal excuse.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503 (2003), citing
2 *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989); *see also, Brown v.*
3 *McDaniel*, 130 Nev. 565, 568-69, 331 P.3d 867 (2014).

4 In his District Court proceedings, Mr. Grigsby argued the illegality of the
5 jury verdict based upon violations of the right to due process, the right to a fair
6 trial, the right to a unanimous jury verdict, and the right to effective assistance of
7 counsel as guaranteed by the United States Constitution. Despite having serious
8 issues of a constitutional magnitude, the District Court rejected Mr. Grigsby’s
9 request for the appointment of counsel.
10

11 To establish good cause for overcoming both procedural bars, Mr. Grigsby
12 explained that he did not cause the delay because he discovered the issue when the
13 United States Supreme Court issued its decision in *Ramos v. Louisiana*, 140 S.Ct.
14 1390, 206 L.Ed.2d 583 (2020). Obviously, Mr. Grigsby, being a pro per petitioner,
15 did not have the legal fortitude to make an artful argument regarding good cause.
16 That being said, Mr. Grigsby certainly explained that he had good cause to
17 overcome the procedural bars because he did not know the issue prior to reading
18 the *Ramos* case.
19
20

21 Moreover, summary dismissal of Mr. Grigsby’s Petition caused undue
22 prejudice because Mr. Grigsby did not receive his rights to due process, a fair trial,
23 and effective assistance of counsel when only ten (10) jurors polled in favor of the
24

1 verdict. Nevada law does not waiver on the requirement for a unanimous verdict.
2 NRS 175.481. The trial court here did not poll all twelve (12) of the jurors. The
3 trial court's failure amounted to a complete violation of Mr. Grigsby's right to a
4 unanimous verdict. Sadly, neither trial counsel nor direct appeal counsel
5 recognized this issue, so neither attorney challenged the jury poll. Mr. Grigsby did
6 not know about the issue in order to raise it in his prior post-conviction habeas
7 proceedings. Mr. Grigsby had no choice but to raise the issue in a second petition,
8 as the writ process constituted the only mechanism to challenge an illegal
9 conviction. Had the District Court simply provided counsel, counsel would have
10 briefed the issues properly for the District Court to consider how prejudicial the
11 dismissal would be. Additionally, the District Court should have held an
12 evidentiary hearing to allow Mr. Grigsby to question trial and appellate counsel
13 about their respective failures to raise the issue.

16 At this juncture, this Court should reverse the District Court's dismissal of
17 the claims and remand the proceedings to allow Mr. Grigsby to brief and address
18 the issues with the assistance of counsel before the District Court. The District
19 Court record cannot support a summary dismissal of these claims. The proper
20 remedy here would be to reverse the dismissal and order the District Court to allow
21 Mr. Grigsby to proceed with counsel's assistance in order to develop this issue
22 fully. As much as he tried, Mr. Grigsby could not develop these issues on his own.
23
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1 His pro per pleadings clearly demonstrate the severity of the issue and the need for
2 counsel. These issues are too severe to be thrown away by procedural bars. Mr.
3 Grigsby demonstrated prejudice to consider the merits of his claims, and this Court
4 should remand the case for further briefing and development.
5

6 **3. The District Court erred by granting the State's plea for dismissal**
7 **under the doctrine of laches.**

8 The District Court abused its discretion by dismissing the Petition under the
9 doctrine of laches.

10 NRS 34.800 requires the State to plead laches when seeking to dismiss a
11 petition based on the rebuttable presumption of prejudice that arises when a
12 petition is filed more than five (5) years after a judgment of conviction. To support
13 the claim for laches in the District Court proceedings, the State relied upon *Hart v.*
14 *State*, 116 Nev. 558, 563, 1 P.3d 969 (2000), to argue that "Consideration of the
15 equitable doctrine of laches is necessary in determining whether a defendant has
16 shown 'manifest injustice' that would permit a modification of a sentence." (ROA,
17 pg. 176). Moreover, the State relied on *Hart* to argue that the Court should apply
18 the doctrine of laches to prevent prejudice to the State that would ensue because
19 Mr. Grigsby filed his Petition after the time bar.
20

21 To overcome the presumption of prejudice to the State, Mr. Grigsby needed
22 to prove a fundamental miscarriage of justice would occur if his Petition were not
23 granted. *Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540 (2001).
24

1 The District Court erroneously found the State's argument persuasive and
2 dismissed the case based on the doctrine of laches. Mr. Grigsby clearly showed the
3 fundamental miscarriage of justice he suffered because the jury poll contained
4 fewer than twelve (12) jurors. Nevada law entitled Mr. Grigsby to a unanimous
5 verdict. NRS 175.481. Justice cannot be served when the jury poll fails to
6 demonstrate a unanimous verdict. There is no justice when rules are broken and a
7 defendant's rights are violated. See, *Mazzan v. Warden*, 112 Nev. 838, 842, 921
8 P.2d 920 (1996). Avoiding a fundamental miscarriage of justice by allowing Mr.
9 Grigsby to litigate the merits of his claims outweighed any prejudice to the State in
10 this situation.
11

12
13 Thus, it is incumbent upon this Court to reverse the District Court's
14 erroneous dismissal of Mr. Grigsby's claims. Mr. Grigsby deserved the chance to
15 present his claims with the assistance of counsel. Therefore, Mr. Grigsby
16 respectfully requests that this Court reverse the dismissal of his claims and remand
17 the proceedings to the District Court.
18

19 **4. The District Court erred by finding that Mr. Grigsby's claims were**
20 **waived for failing to be raised on direct appeal.**

21 The District Court abused its discretion by finding that Mr. Grigsby waived
22 his claims for not raising them on direct appeal.

23 In support of its decision, the District Court relied upon NRS 34.810 and
24 *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), to propose that

1 claims that do not involve either a challenge to the validity of a guilty plea or
2 ineffective assistance of counsel must be filed on direct appeal. (ROA, pg. 180). In
3 *Franklin*, this Court dealt with a case wherein the petitioner filed a post-conviction
4 petition for habeas corpus because his plea counsel did not inform him of his
5 ability to file a direct appeal. The *Franklin* Court also provided examples of
6 situations where a defendant who pleaded guilty would need to appeal from his
7 judgment of conviction and would be able to do so under Nevada law. The
8 *Franklin* case did not provide that a challenge to a guilty plea and challenges
9 regarding ineffective assistance of counsel are the *only* collateral challenges to a
10 conviction. NRS 34.724 expressly permits a petitioner to challenge a conviction
11 that violates the Constitution of the United States or the Constitution of Nevada.
12

13
14 Here, Mr. Grigsby could not have raised his claims on direct appeal. Mr.
15 Grigsby raised the claims at the first opportunity when he discovered the violations
16 of his rights and discovered the ineffective assistance of counsel. Mr. Grigsby's
17 claims involve constitutional violations, which he properly raised in a habeas
18 petition under NRS 34.724. Therefore, he raised the claims at the first available
19 opportunity, and the District Court should have considered the merits of the claims.
20

21 Accordingly, Mr. Grigsby respectfully requests that this Court reverse the
22 dismissal of his claims and remand the case to the District Court for further
23 briefing and consideration on the merits of the claims.
24

1 **5. The District Court erred by finding that Mr. Grigsby was not entitled**
2 **to the appointment of counsel.**

3 Mr. Grigsby recognizes the discretionary nature of appointing post-
4 conviction counsel. See generally, *Bejarano v. Warden*, 112 Nev. 1466, 929 P.2d
5 922 (1996); NRS 34.750. Courts have, of course, held that the Sixth Amendment
6 does not provide the right to post-conviction counsel. *Coleman v. Thompson*, 501
7 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

8 Nevada law allows a district court to use its discretion when considering
9 whether to appoint post-conviction counsel. NRS 34.750(1). This does not,
10 however, absolve the District Court from an abuse of discretion when considering
11 appointment of counsel. *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760
12 (2017). In *Renteria-Nova*, this Court explained:

13 We take this opportunity to stress that the decision whether to appoint
14 counsel under NRS 34.750(1) is not necessarily dependent upon
15 whether a **pro se petitioner** has raised claims that clearly have merit
16 or would warrant an evidentiary hearing.

17 *Renteria-Novoa*, 133 Nev. at 77; see also, *Martinez v. Ryan*, 566 U.S. 1, 11-12,
18 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).¹

19 NRS 34.750(1) allows a court to appoint counsel for an indigent petitioner if
20 “the allegation of indigency is true and the petition is not dismissed summarily...”
21

22 ¹ See, *Fernandez-Morales v. Howell*, 484 P.3d 968 (2021) (unpublished
23 disposition)- The Nevada Court of Appeals found abuse of discretion when the
24 lower court refused to appoint post-conviction counsel for a petitioner with a
language barrier.

1 Here, as explained above, the District Court should not have summarily dismissed
2 the Petition because Mr. Grigsby demonstrated good cause and prejudice to
3 overcome both procedural bars. Therefore, the District Court should have
4 considered the following factors to determine the appropriateness of appointing
5 counsel:
6

7 (a) The issues presented are difficult;

8 (b) The petitioner is unable to comprehend the proceedings; or

9 (c) Counsel is necessary to proceed with discovery.

10 *See*, NRS 34.750(1)(a)-(c).

11
12 Very recently, in *Cordon v. State*, this Court reversed a District Court's
13 refusal to appoint post-conviction counsel because the petitioner explained her
14 indigency and her need for help. *Cordon v. State*, Nevada Supreme Court Case No.
15 81523 (unpublished disposition); see also, *Moore v. State*, 440 P.3d 658 (2019)
16 (unpublished disposition).

17 Mr. Grigsby recognizes that he filed a second petition. Unfortunately, Mr.
18 Grigsby did not have the legal training necessary to explain the good cause and
19 prejudice very well on his own. He should not, however, be penalized for failing to
20 state his arguments in the most eloquent of terms. Mr. Grigsby clearly explained
21 his good cause and prejudice arguments throughout the briefing. It appears from
22
23
24

1 the Findings of Fact, Conclusions of Law and Order, that the District Court did not
2 understand the good cause and prejudice.

3 Mr. Grigsby met the requirements for appointing counsel under NRS 34.750.
4 He presented difficult issues by claiming violations of his right to due process, the
5 right to a fair trial, and the right to effective assistance of counsel. Mr. Grigsby
6 could not have comprehended the intricacies of showing these issues on his own.
7 Mr. Grigsby needed counsel to proceed with discovery and to investigate why trial
8 counsel and appellate counsel failed to challenge the jury poll. Accordingly, the
9 District Court should have understood Mr. Grigsby's demonstration of good cause,
10 and at the very minimum, afforded him counsel to assist him with the proceedings.
11

12 For these reasons, Mr. Grigsby respectfully requests that this Court reverse
13 the District Court's dismissal of his claims and remand the case to allow the
14 appointment of counsel to assist Mr. Grigsby with supplementing his Petition.
15

16 **6. The District Court erred by finding that Mr. Grigsby was not entitled**
17 **to an evidentiary hearing.**

18 A petitioner is entitled to an evidentiary hearing where the petitioner raises a
19 colorable claim of ineffective assistance. *Smith v. McCormick*, 914 F.2d 1153,
20 1170 (9th Cir.1990); *Hendricks v. Vasquez*, 974 F.2d 1099, 1103, 1109-10 (9th
21 Cir.1992). See also *Morris v. California*, 966 F.2d 448, 454 (9th Cir.1991)
22 (remanded for evidentiary hearing required where allegations in petitioner's
23 affidavit raise inference of deficient performance); *Harich v. Wainwright*, 813 F.2d
24

1 1082, 1090 (11th Cir.1987) (“[W]here a petitioner raises a colorable claim of
2 ineffective assistance, and where there has not been a state or federal hearing on
3 this claim, we must remand to the district court for an evidentiary hearing.”);
4 *Porter v. Wainwright*, 805 F.2d 930 (11th Cir. 1986) (without the aid of an
5 evidentiary hearing, the court cannot conclude whether attorneys properly
6 investigated a case or whether their decisions concerning evidence were made for
7 tactical reasons).

9 Mr. Grigsby was entitled to an evidentiary hearing. Mr. Grigsby’s Trial
10 Counsel and Appellate Counsel fell below a standard of reasonableness by failing
11 to challenge the non-unanimous jury poll. This issue required further briefing with
12 the assistance of counsel at the District Court level, but the Court denied counsel.
13 Based on the issues presented to the District Court, both Trial and Appellate
14 Counsel caused Mr. Grigsby to suffer prejudice, pursuant to *Strickland v.*
15 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, the
16 District Court should have granted Mr. Grigsby an evidentiary hearing to
17 determine the extent of the prejudice before dismissing his claims.
18

19
20 Mr. Grigsby respectfully requests that this Court reverse the dismissal of his
21 claims and remand the case for an evidentiary hearing.
22
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24

XI. CONCLUSION

Mr. Grigsby respectfully requests that this Court reverse the District Court's order dismissing his claims and remand the case for the appointment of counsel, further briefing on the merits of the claims, and an evidentiary hearing.

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2 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or
3 more and contains 4,540 words. I understand that I may be subject to sanctions in
4 the event that the accompanying brief is not in conformity with the requirements of
5 the Nevada Rules of Appellate Procedure.
6

7 Dated this 30th day of December, 2021.

8 Respectfully submitted,

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2 I hereby certify and affirm that this document was filed electronically with
3 the Nevada Supreme Court on December 30, 2021. Electronic Service of the
4 foregoing document shall be made in accordance with the Master Service List as
5 follows:
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7 AARON FORD
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11 BY /s/ Nancy Medina
12 Employee of Christopher R. Oram
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