

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARION MUHAMMAD-COLEMAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 82915

ANSWER TO PETITION FOR REVIEW

COMES NOW, Respondent, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, TALEEN PANDUKHT, and submits this Answer to Petition for Review in obedience to this Court's Order Directing Answer to Petition for Review filed October 18, 2022, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 27th day of October, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Taleen Pandukht*

TALEEN PANDUKHT
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ARGUMENT

Appellant's complaints do not warrant review by this Court. A judgment of the Court of Appeals is a final decision that may not be examined by this Court except on a petition for review. NRAP 40(B)(a). "Supreme Court review is not a matter of right but of judicial discretion." NRAP 40(B)(a). Under that rule, the Supreme Court considers the following when determining whether to review a Court of Appeals decision: "(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance." NRAP 40(B)(a). Appellants bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court." NRAP 40(B)(d).

Here, Appellant argues that his "appeal raises a fundamental issue of statewide importance." Petition for Review ("PFR") at 3. Appellant does not address the two (2) other factors when determining whether to review a Court of Appeals decision. See generally PFR. Therefore, the following is the State's response to only the claims raised by Appellant.

The Nevada Court of Appeals correctly found that the district court erred when it failed to apply the mandatory procedural bars to Appellant's Petition.

Appellant's Petition was due by July 30, 2019. Although the State and Appellant stipulated to extend the filing due date to October 1, 2019, this Court has held that such stipulations are improper and that district courts may not disregard the statutory procedural default rules. In addition, Appellant also missed the stipulated extended filing deadline. Thus, even when viewed in the light most favorable to Appellant, the Petition was untimely.

In addition, Appellant failed to demonstrate good cause and prejudice. Appellant's claims were available at the time of the default, and he cannot demonstrate that an impediment external to his defense prevented him from filing his Petition in a timely manner. Because all of Appellant's claims are either time-barred or waived, and Appellant cannot show good cause for the delay, the Appeal must be denied. Accordingly, Appellant's arguments do not provide a basis for review of the Court of Appeals' Order of Affirmance ("Affirmance"). Thus, this Court should decline to review Appellant's Petition.

I. APPELLANT'S ARGUMENTS DO NOT PROVIDE A BASIS FOR REVIEW OF THE COURT OF APPEALS' DECISION AND ORDER

Appellant attempts to argue that his "appeal raises a fundamental issue of statewide importance because it concerns all post-conviction Petitions that will be precluded from review on the merits, due to the reviewing court's discretion on the procedural matter." PFR at 3. To support this claim, Appellant relies on cherry-picked quotes from State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark (Riker), without

complete context of the case. PFR at 4. First, Appellant writes, “However, where the ‘district court has considered the applicable procedural default rules, applied them to a post-conviction habeas petition, and concluded that claims are not procedurally barred,’ the reviewing court will not disturb the district court’s decision. State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).” This quote demonstrates Appellant is claiming that a reviewing court is not permitted to assess a finding regarding procedural bars when the district court has correctly applied the procedural rules and determined that the claims are not procedurally barred. However, that is not an accurate representation of the court’s decision in State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark (Riker).

The Court began its Opinion by stating:

This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. We may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. This court considers whether judicial economy and sound judicial administration militate for or against issuing either writ. *Mandamus and prohibition are extraordinary remedies*, and the decision to entertain a petition lies within the discretion of this court. *The purpose of neither writ is simply to correct errors.*

Riker, 121 Nev. at 231, 112 P.3d at 1074 (emphasis added).

Thereafter, the Court wrote the paragraph from which Appellant obtained the above-quoted sentence. The paragraph, in its entirety, is as follows:

The narrow circumstances in which extraordinary intervention is appropriate; the relief appropriate in this case

We begin our analysis by stressing that extraordinary relief is not warranted for routine correction of errors that a district court may make. Such relief is not in order, for example, where a district court has considered the applicable procedural default rules, applied them to a post-conviction habeas petition, and concluded that claims are not procedurally barred. That the State, or even this court, might disagree with the district court's conclusion is not a reason to seek extraordinary relief as long as the district court has made a reasonable effort to follow the applicable law regarding procedural default. Even if a district court errs, consistent application of procedural default rules in this state can be maintained by our review of the matter on appeal from the district court's final resolution of a petition.

Id. at 121 Nev. at 233, 112 P.3d at 1075. (emphasis added). When read in the correct context, the Nevada Supreme Court is clearly discussing the applicable standard of review for Petitions for Writ of Mandamus/Prohibition. It is not, as Appellant represents, discussing what rulings the Court of Appeals is permitted to make regarding district court findings relating to procedural bars. In other words, the Nevada Supreme Court will not intervene *via Writ of Mandamus/Prohibition* when “the district court has made a reasonable effort to follow the applicable law regarding procedural default.” Id. at 121 Nev. at 233, 112 P.3d at 1075. However, this Court does not mention the extent or character of relief that the Court of Appeals is entitled

to give when reviewing the district court's conclusion on appeal. Thus, the premise on which Appellant's argument relies is incorrect.

Second, Appellant writes, "Even if the reviewing court disagrees with the district court's decision, the decision will not be overturned so long as the district court made reasonable efforts to follow the applicable law. Id. (referencing Riker, 121 Nev. at 233, 112 P.3d at 1075)." This is also an inaccurate portrayal of how the Nevada Supreme Court expressed its Opinion. This Court actually stated, "Therefore, in a case where it is clear that the district court has disregarded the applicable law and failed to decide the issue of procedural default or decided the issue by applying clearly incorrect legal standards, extraordinary relief is likely warranted." Id. at 121 Nev. at 233, 112 P.3d at 1075–76. In the present case, the district court judge did consider the applicable law. Therefore, the only conclusion that can be made according to Riker is that this case would not qualify for consideration for extraordinary relief, such as a Writ of Mandamus. Riker does not govern what the Court of Appeals can do when reviewing the district court's ruling on the procedural bars following a final disposition on the Petition. Thus, Appellant's contention that "[under Riker], the Court of Appeals should not disturb the district court's decision even if it does not agree with it, so long as the district court made reasonable efforts to comply with the procedural bars [and] required at

the very least a remand to district court instead of reversal” blatantly misconstrues the holding in that case. PFR at 1, 7.

This Court reviews the district court’s application of the law de novo, and gives deference to a district court’s factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court's factual findings will be given deference by this Court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). While this Court gives deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, this Court reviews the district court's application of the law to those facts de novo. Id.

Appellant’s claim does not rise to the level of a fundamental issue of statewide importance. The Court of Appeals’ ability to review whether the district court properly applied the procedural bars, and if there was good cause to overcome them, has long been decided. To not allow the Court of Appeals to evaluate a decision that was made by the district court undermines the entire purpose of having the Court of Appeals.

Additionally, Appellant argues that the “affirmance automatically and immediately incentivizes the State...to continue to accept such stipulations.” PFR at 3, 9. It is improper for either a petitioner or the State to enter into a stipulation extending the mandatory one-year filing deadline for the filing of a post-conviction habeas petition. Appellant contends that the stipulation was the result of Appellant’s “counsel’s, the State’s, and the district court’s understanding of the law.” PFR at 3. However, a mistake of law that all parties involved made does not suggest that the State would again or continually enter into legally invalid stipulations as a way to cause the defense to forego arguing good cause. Such an argument is not supported by legal authority or specific factual allegations and is therefore without merit.

II. THE PETITION WAS TIME BARRED

Notwithstanding the fact that this issue is beyond the scope of review, the Petition is time-barred pursuant to NRS 34.726(1):

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

- (a) That the delay is not the fault of the petitioner; and
- (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. Riker, 121 Nev. at 231, 112 P.3d at 1074. The Riker Court found that “[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory,” noting:

Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars “cannot be ignored [by the district court] when properly raised by the State.” Id. at 121 Nev. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules must be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant’s petition was “untimely, successive, and an abuse of the writ” and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant’s petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

In the instant case, the Judgment of Conviction was filed on March 29, 2017. 2 RA 332. Appellant appealed his conviction, which was affirmed by the Supreme Court of Nevada. 4 AA 848. Remittitur was issued on July 30, 2018. Id. While an amended Judgment of Conviction was filed on August 29, 2018, an amended Judgment of Conviction does not change the deadline to file a timely post-conviction Petition for Writ of Habeas Corpus. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Therefore, Appellant’s Petition was due by July 30, 2019.

Approximately one (1) month *after* the filing due date, the State and Appellant entered into a stipulation to extend the filing due date to October 1, 2019. Such a stipulation was improper. The Supreme Court of Nevada has held:

The parties in a post-conviction habeas proceeding cannot stipulate to disregard the statutory procedural default rules. We direct all counsel in the future not to enter into stipulations like the one in this case and direct the district courts not to adopt such stipulations.”

State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 682 (2003). The State maintains that although it conceded this point during the hearing on Appellant’s Habeas Petition, it was still improper for the district court to accept the stipulation. 4 AA 803–04.

Further, even if such a stipulation was proper, Appellant filed the underlying Petition on December 6, 2019, over two (2) months after the stipulated extended filing deadline. By any account, the Petition was untimely. Although the district court arrived at the correct result on the merits, the State maintains that these claims are procedurally barred. Absent a showing of good cause and prejudice, the instant Appeal was properly decided by the Court of Appeals. The Court of Appeals stated:

Muhammad-Coleman filed his petition on December 6, 2019, more than one year after issuance of the remittitur on direct appeal on July 30, 2018. *See Muhammad-Coleman*, No. 72867, 2018 WL 3302828 (Nev. July 3, 2018) (Order of Affirmance). (Footnote omitted). Thus, Muhammad-Coleman's petition was untimely filed. *See* NRS 34.726(1). Muhammad-Coleman's petition was procedurally barred absent a demonstration of good

cause—cause for the delay and undue prejudice. *See id.* "We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

See Muhammad-Coleman, No. 82915-COA, Aug. 18, 2022 (Order of Affirmance) at 1.

III. APPELLANT DID NOT SHOW GOOD CAUSE OR PREJUDICE SUFFICIENT TO OVERCOME THE PROCEDURAL BAR

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added).

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner will be “unduly prejudice[d]” if the petition is dismissed as

untimely. NRS 34.726. To meet the first requirement, “a petitioner *must* show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). “A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available *at the time of default*.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526. To find good cause there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is

itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

In order to establish prejudice, the defendant must show “not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Here, Appellant failed to demonstrate that an impediment external to his defense prevented him from filing his Petition in a timely manner or that his claims were not available at the time of default. Appellant’s underlying Petition and Opening Brief did not address good cause. 4 AA 803–04.

Appellant argued that the existence of the stipulation entered into by the defense and the State to enlarge the time to file a Petition was sufficient to show good cause and that Appellant’s reliance on the stipulation accounted for his failure to address good cause in his underlying Petition and Opening Brief. To support this claim, Appellant relied on this Court’s decision in State v. Haberstroh. However, the facts in Haberstroh are easily distinguishable from the facts here.

In Haberstroh, after a successive habeas petition, the parties stipulated to allow resolution of some of the issues on the merits. Riker, 121 Nev. at 241, 112 P.3d at 1080. Because of these stipulations, Haberstroh did not address good cause to overcome the procedural bars when he appealed the district court's decisions on the remaining claims in his petition. Id. This Court recognized that although "parties in a post-conviction proceeding cannot stipulate to disregard procedural default rules...Haberstroh had in good faith 'relied upon the stipulation and did not present evidence or argument in regard to [good cause].'" Id. So, "to decide the appeal while still complying with the relevant procedural bars, [this Court] treated the stipulation 'as establishing the facts to show cause to raise the relevant claims but allowing consideration of the claims' merits only to determine the question of prejudice. The basis for [this Court's] approach was the recognition that 'parties can stipulate to the facts *but not to the law*.'" Id. (quoting Haberstroh, 119 Nev. at 181 n. 8, 69 P.3d 681 n. 8.) (emphasis added.)

In this case, the parties stipulated to an enlargement of time, which is purely a matter of law. Therefore, the stipulation in this case is not akin to the stipulation in Haberstroh. Further, as previously discussed, Appellant's Petition was filed untimely according to the stipulated filing date as well. Therefore, Appellant cannot reasonably claim that his failure to address good cause in a Petition that was untimely according to both the procedural default rules *and the stipulated deadline* was some

sort of “good-faith reliance” on the stipulation. As such, Appellant failed to establish good cause sufficient to overcome the mandatory procedural bars and his appeal was properly denied by the Court of Appeals. The Court of Appeals stated:

First, Muhammad-Coleman claimed that he had cause for his delay because the basis for several of his claims did not exist until after he had completed an investigation into those claims. A good-cause claim must be raised within one year of its becoming available. *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018). Muhammad-Coleman's underlying claims were reasonably available to have been raised during the timely filing period for a postconviction petition, and Muhammad-Coleman did not allege that an impediment external to the defense prevented him from raising his claims in a timely filed petition. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Accordingly, Muhammad-Coleman was not entitled to relief based on this good-cause claim.

Second, Muhammad-Coleman claimed that he had cause for his delay because the State agreed to allow him to file his petition after expiration of the timely filing deadline. The Nevada Supreme Court has previously stated "that the parties in a post-conviction habeas proceeding cannot stipulate to disregard the statutory procedural default rules. We direct all counsel in the future not to enter into stipulations like the one in this case and direct the district courts not to adopt such stipulations." *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 682 (2003). Accordingly, Muhammad-Coleman was not entitled to relief based on this good-cause claim. (Footnote omitted).

Third, Muhammad-Coleman appeared to claim that he had cause for his delay because he wished to exhaust state remedies. Exhaustion of state remedies in order to seek federal review is insufficient to demonstrate good cause. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *superseded by statute on other*

grounds as stated in Huebler, 128 Nev. at 197 n.2, 275 P.3d at 95 n.2. Accordingly, Muhammad-Coleman was not entitled to relief based on this good-cause claim.

Fourth, Muhammad-Coleman argued that he had cause for his delay because his appellate counsel did not raise his underlying claims on direct appeal. "In order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Muhammad-Coleman's ineffective-assistance-of-counsel claim was itself procedurally barred because he raised it in an untimely manner. Muhammad-Coleman's underlying claim of ineffective assistance of counsel was reasonably available to have been raised during the timely filing period for a postconviction petition, and Muhammad-Coleman did not demonstrate an impediment external to the defense prevented him from raising it in a timely manner. *See id.* at 252-53, 71 P.3d at 506. Accordingly, Muhammad-Coleman was not entitled to relief based on this good-cause claim.

For the foregoing reasons, Muhammad-Coleman did not meet his burden to demonstrate cause for his delay. *See* NRS 34.726(1). Therefore, we conclude that the district court erred by finding Muhammad-Coleman demonstrated good cause and by reviewing his underlying claims on the merits. Nevertheless, the district court properly concluded that Muhammad-Coleman was not entitled to relief, and therefore, we affirm. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

See Muhammad-Coleman, No. 82915-COA, Aug. 18, 2022 (Order of Affirmance)

at 2–4. The Court of Appeals' reasoning as to the statutory procedural default rules was sound and in accordance with longstanding, well established Nevada law.

Therefore, Appellant has failed to demonstrate that this case involves a fundamental

issue of statewide public importance pursuant to NRAP 40(B)(a), which requires the denial of the instant Petition for Review.

CONCLUSION

Based upon the foregoing and the record before this Court, the State respectfully requests that Appellant's Petition for Review be denied.

Dated this 27th day of October, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY /s/ Taleen Pandukht
TALEEN PANDUKHT
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page and type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points, contains 4,239 words.

Dated this 27th day of October, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
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BY */s/ Taleen Pandukht*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 27, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY /s/ J. Hall
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