IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO: 78193

ANSWER TO PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, KAREN MISHLER, and submits this Answer to Petition for Review, in obedience to this Court's Order filed on January 21, 2021, in the above-captioned case. This Answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 3rd day of February, 2021.

Respectfully submitted,

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

BY */s/ Karen Mishler*
KAREN MISHLER
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MEMORANDUM
POINTS AND AUTHORITIES

ARGUMENT

Centofanti, who was convicted of First Degree Murder With Use of a Deadly Weapon in 2005, dissatisfied with the Court of Appeals' affirmance of the district court's denial of his untimely and successive post-conviction petition for writ of habeas corpus, has filed a Petition for Review with this Court, requesting therein that this Court invalidate the decisions issued by the Court of Appeals in its Order of Affirmance and Order Denying Rehearing. Amended Petition at 2.[1] Rather than present argument that the Court of Appeals committed legal error or overlooked presented facts, Centofanti has instead presented this Court with five claims, none of which were presented to the Court of Appeals in his Informal Brief, although one was presented for the first time in his Petition for Rehearing.

"Supreme Court review is not a matter of right but of judicial discretion." NRAP 40B(a). Pursuant to that rule, the Supreme Court considers certain factors when determining whether to review a Court of Appeals decision, including, "(1) Whether the question presented is one of first impression of general statewide

[1]Appellant filed a Petition for Review with this Court on September 11, 2020. Appellant then filed an Amended Petition for Review on January 4, 2021. The two petitions are nearly identical and raise the same claims; the primary difference is that the Amended Petition is typed while the original Petition is handwritten. For the sake of simplicity, when referring to the claims and arguments raised by Appellant, the State will cite only to the Amended Petition.

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 40B(a). Appellants bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court." NRAP 40B(d).

Appellant raises five claims in support of Supreme Court review.[2] First, Appellant claims that Justice Michael Gibbons should have been disqualified from participation in this matter. Amended Petition at 2. Second, Appellant claims that this Court erred by not appointing him counsel to assist him with this appeal. Amended Petition at 2, 4. Third, Appellant claims the district court engaged in "judicial interference" which amounts to good cause to overcome the procedural bars. Amended Petition at 2, 5. Fourth, Appellant claims that the Nevada Rules of Appellate Procedure prejudiced him in the instant litigation and are unfair to incarcerated persons, and requests that this Court "revisit" these rules. Amended Petition at 8. Finally, Appellant claims that the Nevada Department of Corrections is interfering with his access to the courts and the law library. Amended Petition at 2, 9.

[2]Centofanti presents some of his claims differently in his list of questions presented (Amended Petition at 2) than he does in the body of his petition The State addresses the claims as presented in the body of Centofanti's petition.

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT CENTOFANTI WAS NOT ENTITLED TO REHEARING ON HIS DISQUALIFICATION CLAIM

The Court of Appeals properly rejected this claim because Centofanti raised it for the first time in his Petition for Rehearing, and because Centofanti failed to demonstrate he was entitled to any relief on this claim. Centofanti, III v. State, Docket No. 78193-COA (Order Denying Rehearing, Aug. 24, 2020).

The Nevada Rules of Appellate Procedure ("NRAP") prohibit consideration of a new claim in a petition for rehearing. NRAP 40(c)(1) states definitively that "no point may be raised for the first time on rehearing." The purpose of a petition for rehearing is to present "the points of law or fact that the petitioner believes the court has overlooked or misapprehended." NRAP 40(a)(2). NRAP 40(c)(2) allows a court to consider rehearing only when "the court has overlooked or misapprehended a material fact in the record or a material question of law" or when "the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue."

This Court has repeatedly required petitions for rehearing to comply with these procedural rules, and thus cannot find fault with the Court of Appeals for following them. After all, "the primary purpose of a petition for rehearing is to inform this court that we have overlooked an important argument or fact, or that we have misread or misunderstood a statute, case or fact in the record. A party may not

raise a new point for the first time on rehearing." Stanfill v. State, 99 Nev. 499, 501, 665 P.2d 1146, 1147 (1983). See also Ducksworth v. State, 114 Nev. 951, 953, 966 P.2d 165, 166 (1998) (citing NRAP 40(c) and Gordon v. District Court, 114 Nev. 744, 961 P.2d 142 (1998)) ("A petitioner may not reargue an issue already raised or raise a new issue not raised previously."). Not only is there no precedent in this jurisdiction for granting rehearing based upon a claim raised in the first instance in a petition for rehearing, doing so would directly violate the Nevada's procedural rules and this Court's long-standing interpretations of them.

The Court of Appeals recognized that this claim was improperly raised, and was in essence an untimely request for the disqualification of Justice Gibbons. Centofanti, III v. State, Docket No. 78193-COA (Order Denying Rehearing, Aug. 24, 2020), at 2. Under NRAP 35(a)(1), Centofanti was required to request disqualification of a justice within 60 days of the docketing of his appeal, which he did not do.

In his Petition for Review, Centofanti argues that it is unfair to hold him to the time limit proscribed in NRAP 35, because he believed that the Court of Appeals would engage in a screening procedure that would disqualify Justice Gibbons, which would require "no action on his behalf." Amended Petition, at 3. NRAP 35 contains no exception for a party who simply assumes a particular justice will be disqualified, and fails to follow the proper procedure for requesting disqualification. This Court's

procedural rules are not to be lightly disregarded, even for an incarcerated pro per litigant. This Court has warned that rules exist for a reason and violating them comes with a price:

In the words of Justice Cardozo,

> Every system of laws has within it artificial devices which are deemed to promote … forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.

Benjamin N. Cardozo, *The Paradoxes of Legal Science* 68 (1928).

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

Even if the procedural requirements for this claim were ignored, Centofanti failed to demonstrate that disqualification was necessary. While disqualification is certainly necessary in a case in which a justice would be tasked with reviewing his or her own decision on appeal, see Nevada Code of Judicial Conduct Rule 2.11(A), such a situation does not exist here. None of the claims Centofanti has raised on appeal at all relate to the pretrial petition for writ of habeas corpus Justice Gibbons denied 20 years ago. See also Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics—The Lawyer's Deskbook on Professional Responsibility* § 10.2-2.11(l) (2016) ("a judge who heard a case *on the trial level* will not be part of the panel hearing *an appeal from her own decision*.") (emphasis added).

Furthermore, even if disqualification were warranted in this case, it is unclear what kind of relief this Court could offer to Centofanti. After Centofanti raised this disqualification claim for the first time in his Petition for Rehearing, Justice Gibbons recused himself from participating in this matter. Centofanti, III v. State, Docket No. 78193-COA (Order Denying Rehearing, Aug. 24, 2020) at 2 n.1. Thus, the claims raised in Centofanti's Petition for Rehearing were considered without Justice Gibbons' involvement. Centofanti has already received the relief he requested. Centofanti is not entitled to any relief on this claim.

II. PETITIONER'S REMAINING CLAIMS WERE NEVER DECIDE BY THE COURT OF APPEALS

A Petition for Review is in essence a request that this Court review a decision made by the Court of Appeals. See NRAP 40(B)(a). It is procedurally improper for a litigant to raise new claims in a petition for review. Unfortunately, that is precisely what Centofanti has done in this case. Accordingly, all of Centofanti's claims must be summarily denied. The State addresses each of them in turn.

A. Claim 2: Denial of Appointment of Counsel

Centofanti's complaint that he was not appointed counsel to assist him with the instant appeal is obviously procedurally improper. As Centofanti acknowledges, his request for counsel was denied by this Court, not the Court of Appeals. Amended Petition at 4; Centofanti, III, v. State, Docket No. 78193, (Order, Jul. 31, 2019). In essence this claim is an extremely untimely petition for rehearing nestled within a

petition for review. See NRAP 40(a)(1) (requiring a petition for rehearing to be filed within 18 days of the decision). The purpose of a petition for review is for this Court to review a decision made by the Court of Appeals, not to reconsider its own ruling made over one year ago. NRAP 40B. Accordingly, this claim cannot be considered by this Court and must be summarily denied.

Centofanti has also presented no cogent argument as to why he believes he is entitled to the appointment of counsel. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). This Court properly denied Centofanti's request for counsel, stating that "Appellant [Centofanti] is not entitled to appointment of counsel in post-conviction proceedings." Centofanti, III, v. State, Docket No. 78193, (Order, Jul. 31, 2019) (citing Brown v. McDaniel, 130 Nev. 565, 331 P.3d 867 (2014)). Centofanti is not entitled to relief on this claim.

B. Claim 3: Good Cause

Centofanti argues in a conclusory manner that his claim of "judicial interference" constitutes good cause to overcome the procedural bars to his post-conviction petition. Centofanti contends that the Court of Appeals misconstrued his good cause claim by framing it as an ineffective assistance of counsel claim, while he considers it a claim of "judicial interference." Amended Petition, at 5-6. Petitioner

requests this Court "Rule on the issue of Judicial Interference in good cause" (Amended Petition at 6) but fails to provide cogent argument as to how what he terms "judicial interference" constituted good cause for filing a procedurally barred post-conviction petition for writ of habeas corpus.

Appellant appears under the mistaken impression that "judicial interference" is a legal term of art pertaining to habeas petitions.[3] Centofanti appears to contend that the alleged "judicial interference" took the form of appointing him post-conviction counsel that he believes had a conflict. Rather than provide cogent argument demonstrating how such actions constitute good cause for filing an untimely and successive post-conviction habeas petition, Centofanti simply requests that this Court conduct a "review of the procedures in Nevada as to the initial review of habeas Petition (screening), Appointment of counsel under NRS 34.750 and the role of the habeas judge…" Amended Petition, at 6. Such a broad request is not at all appropriate in a petition for review, which requires demonstration of error by the Court of Appeals. Further, such a vague claim unaccompanied by legal or factual support cannot be considered by this Court. See Maresca, 103 Nev. at 673, 748 P.2d at 6.

[3]The phrase "judicial interference" is typically used in situations in which it is questionable whether the judicial system should be at all involved with the matter at hand. See, e.g., N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 129 Nev. 682, 685, 310 P.3d 583, 585 (2013) ("We must also consider whether judicial interference in this matter is precluded by the political question doctrine.").

Regarding Centofanti's claim that the Court of Appeals erred by even considering whether or not he demonstrated good cause, this claim is clearly baseless. Consideration of the procedural bars to post-conviction habeas petitions is mandatory, and on appellate review a court must consider whether or not good cause was presented to overcome them. See, e.g., State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 121 Nev. 225, 233, 112 P.3d 1070, 1076 (2005) (rejecting a district court's finding of good cause where the district court disregarded the applicable law). The Court of Appeals was not required to defer to the district court's finding that Centofanti had demonstrated good cause by alleging he was represented by conflicted counsel during his initial post-conviction proceedings. See State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012) ("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."). The Court of Appeals properly found that, as Centofanti had no statutory or constitutional right to the effective assistance of counsel, his assertion of conflicted counsel could not overcome the procedural bars. Centofanti, III v. State, Docket No. 78193-COA (Order of Affirmance, June 5, 2020), at 2.

Strangely, Centofanti states that "the Court of Appeals may have been precluded by Nevada laws and rules from considering what may be matters of first impression both in a Court of Appeals matter and in reconsideration." Amended

Petition, at 7. Thus, Centofanti acknowledges that the Court of Appeals' decision in this case was not legal error. He then lists three different cases that he requests this Court consider, with no analysis or explanation as to how these cases relate to his good cause argument. Id. at 7-8. He then briefly mentions equitable tolling and the COVID-19 pandemic—again with no analysis or explanation. Id. at 8. This Court should decline to consider these arguments. It is the responsibility of an appellant "to cogently argue, and present relevant authority, in support of his appellate concerns." Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); see also NRAP 28(a)(10)(A); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca, 103 Nev. at 673, 748 P.2d at 6 ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

As to Centofanti's reference to Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309 (2012), this Court has already resolved, in the negative, the question of whether Nevada will apply Martinez to its state procedural rules. "[A] petitioner has no constitutional right to post-conviction counsel and that post-conviction counsel's performance does not constitute good cause to excuse the procedural bars under NRS 34.726(1) or NRS 34.810 unless the appointment of that counsel was mandated by statute." Brown v. McDaniel, 130 Nev. 565, 567, 331 P.3d 867, 869 (2014). Even

assuming *in arguendo* that a request to overrule precedent can even be raised in a petition for review, Centofanti provides no compelling reason for this Court to overrule its prior decision. This claim must be denied.

C. Claims Four And Five: Alleged Unfairness of NRAP and the Nevada Department of Corrections' Procedures to Pro Per Incarcerated Litigants

Centofanti's fourth and fifth claims were never raised before the Court of Appeals, and therefore they cannot be considered by this Court in a petition for review. Additionally, this Court could not grant relief on these claims even if they were properly raised. Centofanti claims that the Nevada Rules of Appellate Procedure prejudiced him in the instant litigation and are unfair to incarcerated persons, and requests that this Court "revisit" these rules. Amended Petition at 8. A petition for review is for demonstrating an error in a previous decision, not for challenging the validity of the rules and laws that were the basis of that decision. As to Centofanti's claim that the Nevada Department of Corrections is interfering with his access to the courts and the law library, in addition to being improperly raised, this Court lacks the authority to order the Nevada Department of Corrections to alter its procedures. These claims warrant no consideration by this Court and must be summarily denied.

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Dated this 3rd day of February, 2021.

Respectfully submitted,

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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 2,744 words.

Dated this 3rd day of February, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 3, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

KAREN MISHLER
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

ALFRED CENTOFANTI, #85237
High Desert State Prison
PO Box 650
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BY */s/ J. Garcia*
Employee, District Attorney's Office

KM/jg