

THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF CORRECTIONS,

Appellant,

vs.

JOSE MIGUEL NAVARRETE, an
individual,

Respondent.

Case No. 82113

District Court No.: A-1979766-9
(Eighth Judicial District Court of
Nevada)

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Elizabeth A. Brown
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JOINT APPENDIX VOL. VII OF VII

Aaron D. Ford
Nevada Attorney General
Michelle Di Silvestro Alanis
Bar No. 10024
Supv. Sr. Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave. #3900
Las Vegas, NV 89101
Phone: 702-486-3268
Fax: 702-486-3773
malanis@ag.nv.gov
Attorneys for Appellant

Dan Marks, Esq.
Bar No. 002003
Law Office of Daniel Marks
610 S. 9th Street
Las Vegas, NV 89144
Phone: 702-386-0536
office@danielmarks.net
Attorney for the Respondent

INDEX

<u>Volume</u>		<u>Page(s)</u>
I	Acceptance of Service, filed 8/9/2019	0017
VI	Affidavit of Supplemental Transmittal, filed 11/20/2019	1430
VI	Affidavit of Transmittal, filed 8/14/2019	1423
VI	Answering Brief, filed 2/26/2020	1465 - 1487
VII	Case appeal statement, filed 11/12/2020	1535 - 1538
I	Certificate of Service, filed 7/2/2019	0018 - 0019
I	Certificate of Supplemental Transmittal, filed 11/20/2019	
	1428 - 1429
IV	Certificate of Transmittal, filed 8/14/2019	1421 - 1422
VII	Findings of Fact, Conclusions of Law and Order, filed 10/12/2020	
	1513 – 1517
VII	Letter to District Court Judge Timothy C. Williams from Department of Administration Hearings Division regarding submittal of files under seal, dated 8/15/19	1588 - 1589
I	Minutes from Motion to Stay, dated 8/29/2019	0199 – 0200
VII	Minute Order on PJR, dated 8/6/2020	1511 -1512
I	Motion for Adjudication of Attorney’s Lien, filed 9/24/2019	

	0204 - 0223
I	Motion for Stay with Exhibits, filed 7/1/2019	0020 – 0153
VII	Notice of Appeal, filed 11/12/2020	1525 - 1534
VII	Notice of Entry of FFCL and Order, filed 10/13/2020	1518 - 1524
I	Notice of Intent to Participate, filed 7/1/2019	0015 - 0016
VI	Opening Brief, filed 11/27/2019	1431 – 1464
I	Opposition to Motion for Adjudication of Attorney’s Lien, filed 9/27/2019	0224 – 0244
I	Opposition to Motion for Stay and Countermotion, filed 7/9/2019
	0154 - 0164
II	Order on Motion for Attorney’s Lien, filed 1/24/2020.....	0263 – 0265
I	Order on Motion for stay, filed 10/9/2019	0201 - 0203
I	Petition for Judicial Review, filed 8/28/2019	0001 - 0014
VI	Reply Brief, filed 5/15/2020	1488 - 1510
I, II	Reply to Opposition to Motion for Adjudication of Lien, filed 10/8/2019.....	0245 - 0258
I	Reply to Opposition to Motion for Stay and Opposition to Countermotion, filed 7/16/2019	0165 - 0198
VII	Reporters Transcript of 6-9-20 hearing, filed 4/9/2021	1539 - 1587
II	Supplemental Points and Authorities, filed 10/14/2019	0259 - 0262

VI Supplemental Transmittal of Record, filed 11/20/2019.....1424 - 1427

II, III, IV

V, VI Transmittal of Record, filed 8/14/2019.....266 - 1420

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on May 10th, 2021, I electronically filed the foregoing document via this Court's electronic filing system. I certify that the following participants in this case are registered electronic filing systems users and will be served electronically:

Daniel Marks, Esq.
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
Office@danielmarks.net

/s/ Anela Kaheaku
Anela Kaheaku, an employee of
the Office of the Attorney General

1 glaring omissions regarding the incident.

2 The hearing officer consistently discussed the testimony of Employee in his decision but
3 completely ignored the testimony of Moore, Wachter, Adams, Russell and Howell. In his Decision, the
4 hearing officer finds that Employee was credible but makes no determination regarding the substantial
5 evidence in the record supporting Employee's misconduct.

6 Agencies must provide the "essential facts upon which the administrative decision was
7 based." *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000). Agencies must explain what
8 justifies their determinations with actual evidence beyond a "conclusory statement." *Allied-Signal, Inc.*
9 *v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993). An Administrative Law Judge "must
10 specifically identify the testimony she or he finds not to be credible and must explain what evidence
11 undermines the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001).

12 Here, the hearing officer failed to explain how he reached the conclusion that Employee did not
13 engage in any wrongdoing when the testimony of at least five other people supported that Employee
14 should not have left the inmate on the wall for an additional 10 minutes following the search.
15 Additionally, the testimony of these same witnesses supported Employee made false statements and
16 glaring omissions in his report. The hearing officer disregarded the investigative file which, included
17 interviews of several inmates that were placed on the wall, including Norelus, and their opinion that
18 Employee and Valdez were singling out Norelus. The hearing officer's failure to analyze the other
19 evidence in the record renders his findings and conclusions arbitrary and capricious as a matter of law.

20 **1. Violation of NAC 284.650 (1)**

21 NDOC charged Employee with violating NAC 284.650(1), activity which is incompatible with
22 an employee's conditions of employment established by law or which violates a provision of NAC
23 284.653 or NAC 284.738 to 284.771. These conditions of employment include Employee's compliance,
24 as a correctional officer, with the 8th Amendment as well as NDOC administrative regulations including
25 AR 405, Use of Force and its corresponding operational policies and procedures.

26 NRS chapter 209 gives the NDOC Director and the Board of State Prison Commissioners the
27 authority to create and implement regulations with respect to the management of the prison and prisoners
28 including Use of Force, Restraints and Operational Procedures. *See* NRS 209.111(3); NRS 209.131(6).

1 Those rules, mandated by the legislature and adopted in accordance with statutory procedures, have
2 the force and effect of law. *Turk v. Nevada State Prison*, 94 Nev. 101, 104, 575 P.2d 599, 601 (1978).

3 Employee's actions of singling out inmate Norelus, patting him down but not releasing him,
4 keeping him on the wall for an excessive amount of time with his hands raised and allowing a situation
5 to escalate resulting in Valdez using unnecessary force, was incompatible with his conditions of
6 employment. A chokehold is not authorized and unlawful. ROA 490. Russell testified that what occurred
7 with Norelus was an assault. ROA 562-563.

8 The evidence showed AR 405.03 states staff may use force to protect himself or any other
9 individual from physical harm by an inmate and will be proportionate to the threat exhibited by the
10 inmate. ROA 910. AR 405.03 further states any staff witnessing use of force that is either excessive or
11 unnecessary is **required to immediately report their observations** to the shift supervisor both verbally
12 and in a written report. ROA 910 (emphasis added). Employee was familiar with AR 405 and understood
13 force must be proportionate to the threat. ROA 189. Furthermore, Employee understood he was required
14 to follow operational procedures and post orders. ROA 189, 191. Employee also understood he was to
15 avoid turning minor problems into major confrontations. *Id.* The post order required Employee to restrict
16 use of force to the minimum degree necessary to regain control or to repel an attack. ROA 192. The post
17 order further required Employee to **notify a shift supervisor and obtain appropriate back up if an**
18 **inmate refuses to comply**. ROA 191 (emphasis added). The post order provides that Search and Escort
19 officers will enforce all rules, regulations, and procedures and counsel inmates in a **discreet and timely**
20 **manner**. ROA 649-650.

21 Employee searched Norelus but kept him on the wall because he was allegedly "non-compliant."
22 Yet, Employee's decision to keep Norelus on the wall for an extended period time was contrary to the
23 policies governing his post. Employee was required to notify a shift supervisor and obtain appropriate
24 back up for non-compliance. Instead, Employee kept Norelus on the wall, allowing Valdez to get riled
25 up and letting the situation escalate to the point where Valdez used excessive force. Wachter testified that
26 Valdez often had to get the last word in with inmates. Certainly, Employee, who had worked with Valdez
27 for one year, recognized Valdez liked to escalate situations. This was incompatible with Employee's
28 conditions of employment and a violation of NAC 284.650(1).

1 **2. Violation of NAC 284.650(10)**

2 NDOC charged Employee with violating NAC 284.650(10), dishonesty. As a peace officer,
3 Employee is expected to adhere to a high level of honesty. The evidence in the record demonstrated that
4 Employee's incident report included false and misleading statements as well as omissions. Employee's
5 report never explained why the inmate was on the wall or that the inmate was non-compliant. With respect
6 to the use of force, Employee reported, "At approximately 06:45 hours inmate Norelus #1104257 came
7 off the Culinary wall while C/O Valdez was attempting to restrain him resulting in a spontaneous use of
8 force." ROA 872.

9 The hearing officer **found the inmate's hands remained on the wall and that there was no**
10 **evidence that Valdez was restraining the inmate.** ROA 585 (emphasis added). However, despite these
11 findings, the hearing officer did not find that Employee's statement to be false or misleading. Instead
12 after "much soul searching," the hearing officer found the report accurate. ROA 590.

13 The hearing officer did not need to search his soul because the evidence made Employee's
14 dishonesty clear:

- 15 • Russell testified "at no time did I see [Norelus] resist and according to the-the report, he
16 was resisting when he was trying to be restrained and I didn't see any of that in the report
[sic], which spoke to the integrity of both officers." ROA 561.
 - 17 • Russell testified that omission is deception. The report should have included the fact that
18 inmate was on the wall for 10-15 minutes, Valdez pushed the inmate, there was no
resistance, he grabbed him around the neck and threw him to the ground. ROA 562-563.
 - 19 • Both Wachter and Moore testified that based on the video, Norelus did not come off the
20 wall and Valdez was not attempting to restrain because Valdez did not have his restraints
21 out and did not use the approved technique to restrain. ROA 430, 477, 448-450.
 - 22 • Adams testified when completing a report, an officer is required to include as much detail
23 as possible, particularly when reporting use of force. ROA 541.
 - 24 • Howell testified NDOC has to be able to believe an officer's report and if an officer loses
25 credibility it decreases the effectiveness of the institution because they have to take the
report on its face as true and believe the officers are truthful. Having an untruthful officer
affects the whole workforce. ROA 29-31.
 - 26 • Russell testified as a senior officer, Employee had an obligation to be honest, submit a a
27 correct report and alert supervisory staff of what occurred. ROA 562.
- 28

1 The substantial evidence in the whole record supported that Employee was dishonest and a
2 violation of NAC 284.650(10).

3 **3. Violation of NAC 284.650(21)**

4 NDOC charged Employee with violating NAC 284.650(21) - any act of violence, which arises
5 out of or in the course of the performance of the employee's duties, including, without limitation, stalking,
6 conduct that is threatening or intimidating, assault, or battery. While NDOC was not charging Employee
7 with actually placing hands on Norelus, NDOC was charging him for allowing/permitting the situation
8 to escalate and allowing Valdez, a subordinate officer, to use excessive force.

9 The hearing officer found that there was no set time to keep an inmate on the wall. But the
10 evidence supported that Employee kept the inmate on the wall for an **excessive** amount of time:

- 11 • Wachter testified it was excessive to keep Norelus on the wall for an additional eight
12 minutes. An officer does not have time to counsel for ten minutes when there are other
13 duties to attend to, including maintaining safety and security of the prison. ROA 464.
- 14 • Moore testified keeping an inmate on a wall for seven minutes was not customary. ROA
15 452.
- 16 • The video shows the actual search of Norelus took only about 30 seconds. ROA 838.

17 The hearing officer found that Employee could not have prevented the excessive use of force. But
18 the evidence contradicted this finding and showed that, as the supervisor, Employee should have released
19 the inmate and intervened when the incident escalated:

- 20 • Wachter testified as a senior officer, Employee could have intervened and taken over if
21 he observed that Valdez was keeping the inmate on the wall for too long. ROA 448-449.
- 22 • Adams testified Employee as the senior officer should intervene and tell the other officer
23 to take a break and take the inmate to the sergeant's office. ROA 501.
- 24 • Moore testified it was Employee's job to deescalate and contain the situation. ROA 363,
25 418.
- 26 • Adams as the associate warden and with over thirty years' experience at NDOC testified
27 that his opinion was Employee permitted the unnecessary force to occur. ROA 540
- 28 • Russell testified Employee as the senior had a responsibility and obligation to do
something different during the 10 minutes to prevent a use of force. ROA 561.

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1 Furthermore, Russell testified the actions were an assault and Adams testified the choke hold was
2 unlawful, which further supports the violation under NAC 284.650(21).

3 The hearing officer did not determine whether Norelus was targeted; however, the evidence
4 supported Norelus was singled out and harassed:

- 5 • Norelus told investigators he was routinely singled out by Employee and Valdez. ROA 811
- 6
- 7 • White told investigators Employee and Valdez were routinely going at it. ROA 811
- 8 • Jackson said staff was singling out black inmates. ROA 811
- 9 • Wachter testified Valdez always had to get the last word. ROA 813
- 10 • Moore testified by keeping an inmate on the wall for an excessive period of time when
- 11 all other inmates have been released, it is singling out the inmate in front of other
- 12 inmates. ROA 3636-364.
- 13 • The video shows despite Employee and Valdez's job to search inmates, over 120
- 14 inmates left culinary without being searched despite the "order to crack down on
- contraband."

15 The substantial evidence established Employee violated NAC 284.650(21) when he engaged in
16 act of violence against Norelus, including harassing him, singling him out, and allowing excessive force.

17 **G. It was clear error and an abuse of discretion for the Hearing Officer to rely on his "soul**
18 **searching" in determining whether Employee was dishonest**

19 NRS 284.390(6) provides, after the hearing and **consideration of the evidence**, the hearing
20 officer shall render a decision in writing, setting forth the reasons therefor. The hearing officer is not to
21 consider his own personal feelings or soul searching. The hearing officer concluded, "My conclusion,
22 after much soul searching and many reviews of the video and the statement is that Mr. Navarrete's report
23 is brief and essentially, factually accurate given what he reasonably could have been expected to perceive
24 at the time." ROA 590. It was clear error for the hearing officer to search his soul for his findings and
25 conclusions rather than the reliable, probative and substantial evidence in the record that revealed
26 Employee was dishonest in his report.

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CONCLUSION

Based on the foregoing, Petitioner respectfully requests entry of this Court's Order granting Petitioner's Petition for Judicial Review and reversing and setting aside the hearing officer's Decision in its entirety.

DATED May 15, 2020.

AARON D. FORD
Attorney General

By: /s/ Michelle Di Silvestro Alanis
Michelle Di Silvestro Alanis (Bar No. 10024)
Supervising Senior Deputy Attorney General
Attorneys for Petitioner
State of Nevada ex rel. Department of Corrections

CERTIFICATE OF COMPLIANCE

1. 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 in 12 pt. Times New Roman; or

☐ This brief has been prepared in a monospaced typeface using *[state name and version of word-processing program]* with *[state number of characters per inch and name of type style]*.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 12 points or more, and contains 6,979 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☐ Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate 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: May 15, 2020.

AARON D. FORD
Attorney General

By: /s/ Michelle Di Silvestro Alanis
Michelle Di Silvestro Alanis (Bar No. 10024)
Supervising Senior Deputy Attorney General
Attorneys for Petitioner
State of Nevada ex rel. Department of Corrections

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I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the May 15, 2020 I electronically filed the foregoing **PETITIONER'S REPLY BRIEF** with the Clerk of the Court by using the electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made on May 18, 2020 by depositing a copy for mailing in the United States Mail, first-class postage pre-paid, at Las Vegas, Nevada to the following:

Mark Gentile
Hearing Officer
Department of Administration
2200 S. Rancho Dr., Ste. 210
Las Vegas, Nevada 89102

Daniel Marks, Esq.
Law Offices of Daniel Marks
610 S. 9th St.
Las Vegas, NV 89101

/s/ Anela Kaheaku
Anela Kaheaku, an employee of the
Office of the Nevada Attorney General

A-19-797661-J

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Judicial Review/Appeal

COURT MINUTES

August 06, 2020

A-19-797661-J Nevada Dept of Corrections, Petitioner(s)
vs.
Jose Navarette, Respondent(s)

August 06, 2020 8:00 AM Minute Order re: Petition for Judicial Review

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After a review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, the Court determined as follows:

NRS 233B.135 sets forth the rules of judicial review district courts must follow. Along with NRS 233B.135, the Court finds that O’Keefe v. Dept. of Motor Veh., 134 Nev. 752 (2018), and Nassiri v. Chiropractic Phys. Bd., 130 Nev. 245, 251(2014) provide guidance that aids district courts in reaching a decision. Under the review process found in O’keefe, a hearing officer must first determine whether the employee in fact committed the alleged violation. O’Keefe, 134 Nev. at 759. Since the hearing officer reviews the facts, the applicable standard for this review is the preponderance-of-the-evidence standard. *See* Nassiri v. Chiropractic Phys. Bd., 130 Nev. 245, 251(2014) (holding that in absence of a specific governing statute, the preponderance-of-the-evidence standard should be applied, as it is the minimum standard to guarantee due process).

In the instant action, the hearing officer concluded that Navaratte did not commit the alleged violations. The Court finds that the hearing officer’s factual determinations are supported by substantial evidence. *See* Nassiri, 130 Nev. at 249-50. Consequently, the Court **AFFIRMS** the

PRINT DATE: 08/06/2020

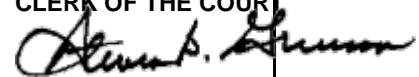
Page 1 of 2

Minutes Date: August 06, 2020

hearing officer's ruling.

Respondent shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: This Minute Order has been served to counsel electronically through Odyssey eFile.



LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
office@danielmarks.net
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorney for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel, DEPARTMENT
OF CORRECTIONS,

Case No.: A-19-797661-J
Dept. No.: XVI

Petitioner,

v.

JOSE MIGUEL NAVARRETE, an individual;
STATE OF NEVADA ex rel; its
DEPARTMENT OF ADMINISTRATION
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR
JUDICIAL REVIEW**

This matter having come on for hearing on the 9th day of June, 2020, on Petitioner's
Petition for Judicial Review, filed on June 28, 2019. Petitioner State of Nevada appearing by and
through its counsel, Michelle Di Silvestro Alanis, of the Attorney General's Office; and
Respondent Jose Navarrete appearing by and through his counsel Daniel Marks, Esq., of the Law
Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, including
Petitioner's Opening Brief, filed on November 27, 2019; Respondent's Answering Brief, filed on
February 26, 2020; and Petitioner's Reply Brief, filed on May 15, 2020; having heard the
arguments of counsel, and good cause appearing:

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<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 **A. Findings of Fact**

2 THE COURT HEREBY FINDS that the hearing officer's factual conclusions are
3 supported by substantial evidence. *See Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 249-50
4 (2014).

5 Respondent Jose Navarrete ("Navarrete") was terminated for an incident involving
6 another correction officer, Paul Valdez ("Valdez"), and inmate Rickie Norelus ("Norelus") at
7 Southern Desert Correctional Center ("SDCC"). (ROA 583.)

8 On October 9, 2016, during the breakfast service, Navarrete and Valdez "were randomly
9 searching inmates leaving culinary for contraband." (ROA 583-84.) This search, as well as other
10 searches, are "a common occurrence" at SDCC. (ROA 583.) A surveillance video recorded the
11 incident from a single perspective with no audio. (ROA 583.)

12 During the hearing at issue, Hearing Officer Mark Gentile ("Gentile") was provided an
13 enhanced and slow motion video of the crucial moments of this incident. (ROA 584, 709-11 &
14 1150-51.) Navarrete also provided comprehensive testimony regarding what occurred during
15 each stage of the encounter. (ROA 584.) Gentile found Navarrete credible. (ROA 584.)

16 Gentile also found, "without question":

17 that Mr. Norelus was acting differently than the other inmates when placed on the
18 wall for a pat down. He was clearly agitated and his hands were not in the proper
19 position. He appears to be continually looking around anxiously. There is,
20 unfortunately, no audio and one cannot determine what is being said by the
21 officers or the inmates - yet, the head and body movements of all reflect, without a
22 doubt, that there was continual chatter by inmate Norelus. The testimony by Mr.
23 Navarrete was that Mr Norelus was being uncooperative and verbally abusive
24 throughout the encounter.

25 (ROA584.) These findings support Navarrete's testimony that Norelus was noncompliant.

26 With regard to this incident, Gentile found:

27 As Officer Valdez abruptly approaches the inmate from behind, the inmate does
28 move backward slightly off the wall and looks over his left shoulder. You can see
the inmate's left arm and shoulders slightly moving backwards, but the hands
remain on the wall. Officer Valdez then pushes the inmate into the wall, grabs the
inmate's neck with his right arm, and wrestles him to the ground.

(ROA 585.)

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1 This all “occurred in a matter of a few seconds.” (ROA 585.) Valdez immediately cuffed
2 Norelus once on the ground, and Navarrete came over to assist. (ROA 585.) Gentile found that
3 even with the enhanced video, Valdez’ conduct was unjustified. (ROA 585.)

4 With regard to the post-incident video, that includes audio, Gentile found that while
5 Norelus is leaving the area he is “laughing at the officers and claiming they will ‘put his kids
6 through college.’” (ROA 586.) He also “does not appear injured and his conduct makes it seem
7 as if he may have been baiting the officers to some extent, which according to the testimony is a
8 common occurrence” at SDCC. (ROA 586.)

9 Navarrete later submitted an informational report, which states:

10 On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned to
11 Search and Escort Southern Desert Correctional Center. At approximately 06:45
12 hours inmate Norelus #1104257 came off the Culinary wall while C/O Valdez
13 was attempting to restrain him resulting in the spontaneous use of force. When
14 inmate Norelus came off the wall he was resisting and both he and C/O Valdez
went to the ground. I then assisted in holding the inmates upper body down so that
C/O Valdez could restrain him. I notified supervisors and called medical so that
they could respond to the scene. Medical responded and inmate Norelus was
escorted to the infirmary to be further evaluated.

15 (ROA 586.)

16 With regard to Navarrete’s involvement in this incident, Gentile specifically found that
17 NDOC failed to establish “factually by a preponderance of the evidence, that [] Navarrete
18 willfully employed or permitted the use of unauthorized or excessive force” and that “there is
19 absolutely no evidence to reflect that he personally utilized excessive force.” (ROA 588.) This is
20 because Valdez’ use of force “was quite sudden and was over in a matter of a few seconds.”
21 (ROA 589.) Gentile specifically found Navarrete could not have anticipated, nor prevented,
22 Valdez’s spontaneous use of force. (ROA 589.)

23 With regard to the charge of dishonesty in relation to Navarrete’s use of force report,
24 Gentile found, as follows:

25 Navarrete wrote the report without the benefit of reviewing any video - he was
26 trying to assimilate and explain this unexpected event he saw occur literally in a a
27 matter of second. The reality is Mr. Navarrete saw this event (the physical use of
28 force by Officer Valdez) take place in a matter of 2-3 seconds, from a side
perspective. He saw it only one time.

1 (ROA 590.) He then concluded:

2 Navarrete's report is brief and, essentially, factually accurate given what he
3 reasonably could be expected to have perceived at the time. From his testimony,
4 and even in his pre-hearing interviews, it is clear that he believed, initially, Officer
5 Valdez was intending to restrain the inmate. While this was happening, a
6 spontaneous use of force situation occurred. Norelus did come off the wall as
7 Officer Valdez was either properly or improperly attempting to restrain him, but I
8 do not think Mr. Navarrete could be fairly called up to conclude from his 2-3
9 second perception whether Officer Valdez' actions were appropriate or not, or
10 whether the take down was initiated by the wrongful conduct of the inmate or of
11 Officer Valdez. The inmate did rock backwards just prior to physical contact. I do
12 not believe that Mr. Navarrete was in the position to know what Officer Valdez
13 perceived or why this ended as it did. Mr. Navarrete's report is a bland statement
14 of events which are, essentially, true. "When he came off the wall he was
15 resisting." They did end up about 15 feet away - inmate Norelus didn't just flop to
16 the ground. Both officers, ultimately, had to restrain the inmate. Once again, this
17 appears, to me, to be a plain statement that appears, essentially true.

18 (ROA 590-91.)

19 Based on these factual findings, and NDOC's failure to prove otherwise by a
20 preponderance of the evidence, Gentile concluded that Navarrete's dismissal from NDOC be
21 reversed with restoration to his prior position with back pay and benefits. (ROA 591.)

22 **B. Conclusions of Law**

23 NRS 233B.135 sets forth the rules of judicial review district courts must follow. Along
24 with NRS 233B.135, the Court finds that *O'Keefe v. Dept. of Motor Veh.*, 134 Nev. 752 (2018),
25 and *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 251(2014) provide guidance that aids the
26 district court's review on the instant petition. Under the review process found in *O'Keefe*, a
27 hearing officer must first determine whether the employee in fact committed the alleged
28 violation. *O'Keefe*, 134 Nev. at 759. When a hearing officer's conclusions of law are closely
related to the findings of fact, those legal conclusions must also be afforded deference and may
not be disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 719 P.2d
805 (1986).

Since the hearing officer reviews the facts, the applicable standard for this review is the
preponderance-of-the-evidence standard. See *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245,
251(2014) (holding that in absence of a specific governing statute, the preponderance of the
evidence standard should be applied, as it is the minimum standard to guarantee due process).

1 The hearing officer ultimately concluded, under step one of *O'Keefe* and the preponderance of
2 the evidence standard, that Navarrete did not commit the alleged violations.

3 Petitioner failed to prove the hearing officer's decision violated Petitioner's substantial
4 rights under NRS 233B.135(2). To meet this burden, the petitioner must prove the agency's
5 decision (1) violates the constitution or other statutory provisions, (2) exceeds the agency's
6 statutory authority, (3) is based on an unlawful procedure, (4) constitutes legal error, (5) clearly
7 erroneous based on "reliable probative and substantial evidence on the whole record," or (6)
8 "arbitrary and capricious or characterized by abuse of discretion." NRS 233B.135(2). Petitioner
9 failed to prove any of these bases to reverse the hearing officer's decision.

10 **C. Order**

11 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the hearing officer's
12 ruling is hereby AFFIRMED.

13 DATED this 9th day of October, 2020.

14 
15 DISTRICT COURT JUDGE ZJ

16
17 Respectfully submitted:

18 DATED this 2nd day of October, 2020.

19 LAW OFFICE OF DANIEL MARKS

20 /s/ Nicole M. Young

21 DANIEL MARKS, ESQ.

22 Nevada State Bar No. 002003

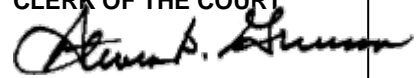
23 NICOLE M. YOUNG, ESQ.

24 Nevada State Bar No. 012659

25 610 S. Ninth Street

26 Las Vegas, Nevada 89101

27 Attorneys for Respondent/Employee
28



NEOJ
LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
office@danielmarks.net
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
alevine@danielmarks.net
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Case No.: A-19-797661-J
Dept. No.: XVI

Petitioner,

vs.

JOSE MIGUEL NAVARRETE, an individual;
STATE OF NEVADA ex rel., its
DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

**NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER ON PETITION FOR JUDICIAL REVIEW**

TO: STATE OF NEVADA ex rel, DEPARTMENT OF PUBLIC SAFETY, Petitioner; and

TO: MICHELLE DI SILVESTRO ALANIS, Deputy Attorney General, Attorney for Petitioner:

1 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW,**
2 **AND ORDER ON PETITION FOR JUDICIAL REVIEW**

3 PLEASE TAKE NOTICE that an Order was entered in the above-entitled action on the 12th day
4 of October 2020, a copy of which is attached hereto.

5 DATED this 12th day of October 2020.

6 LAW OFFICE OF DANIEL MARKS

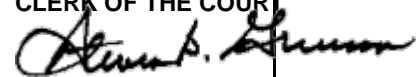
7 /s/Adam Levine, Esq.
8 DANIEL MARKS, ESQ.
9 Nevada State Bar No. 002003
10 office@danielmarks.net
11 ADAM LEVINE, ESQ.
12 Nevada State Bar No. 004673
13 alevine@danielmarks.net
14 610 South Ninth Street
15 Las Vegas, Nevada 89101
16 (702) 386-0536: FAX (702) 386-6812
17 *Attorneys for*

18 **CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

19 I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 12th
20 day of October 2020, pursuant to NRCP 5(b) and Administrative Order 14-2, I electronically
21 transmitted a true and correct copy of the above and foregoing NOTICE OF ENTRY OF FINDINGS
22 OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR JUDICIAL REVIEW by
23 way of Notice of Electronic Filing provided by the court mandated E-file & Serve system, to the e-mail
24 address on file for:

25 Michelle Di Silvestro Alanis, Esq.
 Deputy Attorney General
 ATTORNEY GENERAL'S OFFICE
 Attorney for Petitioner
 e-mail: malanis@ag.nv.gov
 akaheaku@ag.nv.gov

/s/ Joi E. Harper
 An employee of the
 LAW OFFICE OF DANIEL MARKS_____



LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
office@danielmarks.net
610 South Ninth Street
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(702) 386-0536; FAX (702) 386-6812
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DISTRICT COURT
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STATE OF NEVADA ex rel, DEPARTMENT
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON PETITION FOR
JUDICIAL REVIEW**

This matter having come on for hearing on the 9th day of June, 2020, on Petitioner's
Petition for Judicial Review, filed on June 28, 2019. Petitioner State of Nevada appearing by and
through its counsel, Michelle Di Silvestro Alanis, of the Attorney General's Office; and
Respondent Jose Navarrete appearing by and through his counsel Daniel Marks, Esq., of the Law
Office of Daniel Marks; the Court having reviewed the papers and pleadings on file, including
Petitioner's Opening Brief, filed on November 27, 2019; Respondent's Answering Brief, filed on
February 26, 2020; and Petitioner's Reply Brief, filed on May 15, 2020; having heard the
arguments of counsel, and good cause appearing:

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<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
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1 **A. Findings of Fact**

2 THE COURT HEREBY FINDS that the hearing officer's factual conclusions are
3 supported by substantial evidence. *See Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 249-50
4 (2014).

5 Respondent Jose Navarrete ("Navarrete") was terminated for an incident involving
6 another correction officer, Paul Valdez ("Valdez"), and inmate Rickie Norelus ("Norelus") at
7 Southern Desert Correctional Center ("SDCC"). (ROA 583.)

8 On October 9, 2016, during the breakfast service, Navarrete and Valdez "were randomly
9 searching inmates leaving culinary for contraband." (ROA 583-84.) This search, as well as other
10 searches, are "a common occurrence" at SDCC. (ROA 583.) A surveillance video recorded the
11 incident from a single perspective with no audio. (ROA 583.)

12 During the hearing at issue, Hearing Officer Mark Gentile ("Gentile") was provided an
13 enhanced and slow motion video of the crucial moments of this incident. (ROA 584, 709-11 &
14 1150-51.) Navarrete also provided comprehensive testimony regarding what occurred during
15 each stage of the encounter. (ROA 584.) Gentile found Navarrete credible. (ROA 584.)

16 Gentile also found, "without question":

17 that Mr. Norelus was acting differently than the other inmates when placed on the
18 wall for a pat down. He was clearly agitated and his hands were not in the proper
19 position. He appears to be continually looking around anxiously. There is,
20 unfortunately, no audio and one cannot determine what is being said by the
21 officers or the inmates - yet, the head and body movements of all reflect, without a
22 doubt, that there was continual chatter by inmate Norelus. The testimony by Mr.
23 Navarrete was that Mr Norelus was being uncooperative and verbally abusive
24 throughout the encounter.

25 (ROA584.) These findings support Navarrete's testimony that Norelus was noncompliant.

26 With regard to this incident, Gentile found:

27 As Officer Valdez abruptly approaches the inmate from behind, the inmate does
28 move backward slightly off the wall and looks over his left shoulder. You can see
the inmate's left arm and shoulders slightly moving backwards, but the hands
remain on the wall. Officer Valdez then pushes the inmate into the wall, grabs the
inmate's neck with his right arm, and wrestles him to the ground.

(ROA 585.)

////

1 This all “occurred in a matter of a few seconds.” (ROA 585.) Valdez immediately cuffed
2 Norelus once on the ground, and Navarrete came over to assist. (ROA 585.) Gentile found that
3 even with the enhanced video, Valdez’ conduct was unjustified. (ROA 585.)

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5 Norelus is leaving the area he is “laughing at the officers and claiming they will ‘put his kids
6 through college.’” (ROA 586.) He also “does not appear injured and his conduct makes it seem
7 as if he may have been baiting the officers to some extent, which according to the testimony is a
8 common occurrence” at SDCC. (ROA 586.)

9 Navarrete later submitted an informational report, which states:

10 On October 9, 2016 I, Senior Correctional Officer Navarrete was assigned to
11 Search and Escort Southern Desert Correctional Center. At approximately 06:45
12 hours inmate Norelus #1104257 came off the Culinary wall while C/O Valdez
13 was attempting to restrain him resulting in the spontaneous use of force. When
14 inmate Norelus came off the wall he was resisting and both he and C/O Valdez
went to the ground. I then assisted in holding the inmates upper body down so that
C/O Valdez could restrain him. I notified supervisors and called medical so that
they could respond to the scene. Medical responded and inmate Norelus was
escorted to the infirmary to be further evaluated.

15 (ROA 586.)

16 With regard to Navarrete’s involvement in this incident, Gentile specifically found that
17 NDOC failed to establish “factually by a preponderance of the evidence, that [] Navarrete
18 willfully employed or permitted the use of unauthorized or excessive force” and that “there is
19 absolutely no evidence to reflect that he personally utilized excessive force.” (ROA 588.) This is
20 because Valdez’ use of force “was quite sudden and was over in a matter of a few seconds.”
21 (ROA 589.) Gentile specifically found Navarrete could not have anticipated, nor prevented,
22 Valdez’s spontaneous use of force. (ROA 589.)

23 With regard to the charge of dishonesty in relation to Navarrete’s use of force report,
24 Gentile found, as follows:

25 Navarrete wrote the report without the benefit of reviewing any video - he was
26 trying to assimilate and explain this unexpected event he saw occur literally in a
27 matter of second. The reality is Mr. Navarrete saw this event (the physical use of
28 force by Officer Valdez) take place in a matter of 2-3 seconds, from a side
perspective. He saw it only one time.

1 (ROA 590.) He then concluded:

2 Navarrete's report is brief and, essentially, factually accurate given what he
3 reasonably could be expected to have perceived at the time. From his testimony,
4 and even in his pre-hearing interviews, it is clear that he believed, initially, Officer
5 Valdez was intending to restrain the inmate. While this was happening, a
6 spontaneous use of force situation occurred. Norelus did come off the wall as
7 Officer Valdez was either properly or improperly attempting to restrain him, but I
8 do not think Mr. Navarrete could be fairly called up to conclude from his 2-3
9 second perception whether Officer Valdez' actions were appropriate or not, or
10 whether the take down was initiated by the wrongful conduct of the inmate or of
11 Officer Valdez. The inmate did rock backwards just prior to physical contact. I do
12 not believe that Mr. Navarrete was in the position to know what Officer Valdez
13 perceived or why this ended as it did. Mr. Navarrete's report is a bland statement
14 of events which are, essentially, true. "When he came off the wall he was
15 resisting." They did end up about 15 feet away - inmate Norelus didn't just flop to
16 the ground. Both officers, ultimately, had to restrain the inmate. Once again, this
17 appears, to me, to be a plain statement that appears, essentially true.

18 (ROA 590-91.)

19 Based on these factual findings, and NDOC's failure to prove otherwise by a
20 preponderance of the evidence, Gentile concluded that Navarrete's dismissal from NDOC be
21 reversed with restoration to his prior position with back pay and benefits. (ROA 591.)

22 **B. Conclusions of Law**

23 NRS 233B.135 sets forth the rules of judicial review district courts must follow. Along
24 with NRS 233B.135, the Court finds that *O'Keefe v. Dept. of Motor Veh.*, 134 Nev. 752 (2018),
25 and *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 251(2014) provide guidance that aids the
26 district court's review on the instant petition. Under the review process found in *O'Keefe*, a
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Since the hearing officer reviews the facts, the applicable standard for this review is the
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1 The hearing officer ultimately concluded, under step one of *O'Keefe* and the preponderance of
2 the evidence standard, that Navarrete did not commit the alleged violations.

3 Petitioner failed to prove the hearing officer's decision violated Petitioner's substantial
4 rights under NRS 233B.135(2). To meet this burden, the petitioner must prove the agency's
5 decision (1) violates the constitution or other statutory provisions, (2) exceeds the agency's
6 statutory authority, (3) is based on an unlawful procedure, (4) constitutes legal error, (5) clearly
7 erroneous based on "reliable probative and substantial evidence on the whole record," or (6)
8 "arbitrary and capricious or characterized by abuse of discretion." NRS 233B.135(2). Petitioner
9 failed to prove any of these bases to reverse the hearing officer's decision.

10 **C. Order**

11 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the hearing officer's
12 ruling is hereby AFFIRMED.

13 DATED this 9th day of October, 2020.

14 
15 DISTRICT COURT JUDGE ZJ

16
17 Respectfully submitted:

18 DATED this 2nd day of October, 2020.

19 LAW OFFICE OF DANIEL MARKS

20 /s/ Nicole M. Young

21 DANIEL MARKS, ESQ.

22 Nevada State Bar No. 002003

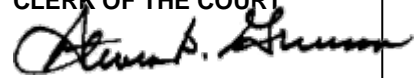
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AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Deputy Attorney General
State of Nevada
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
Tel: (702) 486-3268
Fax: (702) 486-3773
malanis@ag.nv.gov
*Attorneys for Petitioner STATE OF NEVADA
ex rel. DEPARTMENT OF CORRECTIONS*

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JOSE MIGUEL NAVARRETE, an individual;
STATE OF NEVADA ex rel., its
DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

CASE NO: A-19-797661-J

DEPT NO: XVI

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, State of Nevada ex rel. its Department of Corrections, hereby appeals to the Supreme Court of Nevada from the District Court's Findings of Fact, Conclusions of Law, and Order on Petition for Judicial Review entered in this action on the 13th day of October, 2020, which is attached as Exhibit 1.

DATED: November 12, 2020.

AARON D. FORD
Attorney General

By: /s/ Michelle Di Silvestro Alanis
Michelle Di Silvestro Alanis (Bar No. 10024)
Supervising Senior Deputy Attorney General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 12th day of November, 2020; I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of the Court by using the electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically.

Daniel Marks, Esq,
Law Offices of Daniel Marks
610 S. Ninth St.
Las Vegas, NV 89101

For those parties not registered, service will be made on November 18, 2020 by depositing a copy for mailing in the United States Mail, first-class postage pre-paid, at Las Vegas, Nevada to the following:

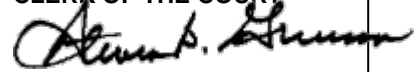
Mark Gentile
Hearing Officer
Department of Administration
2200 S. Rancho Dr. Ste. 220
Las Vegas, NV 89102

/s/ Anela Kaheaku

An employee of the State of Nevada
Office of the Attorney General

EXHIBIT 1

EXHIBIT 1



NEOJ
LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
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office@danielmarks.net
ADAM LEVINE, ESQ.
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(702) 386-0536: FAX (702) 386-6812
Attorneys for Respondent Jose Navarrete

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
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TO: STATE OF NEVADA ex rel, DEPARTMENT OF PUBLIC SAFETY, Petitioner; and

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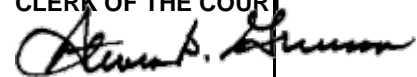
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 LAW OFFICE OF DANIEL MARKS_____



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1 **A. Findings of Fact**

2 THE COURT HEREBY FINDS that the hearing officer's factual conclusions are
3 supported by substantial evidence. *See Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 249-50
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25 (ROA584.) These findings support Navarrete's testimony that Norelus was noncompliant.

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28 move backward slightly off the wall and looks over his left shoulder. You can see
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24 Gentile found, as follows:

25 Navarrete wrote the report without the benefit of reviewing any video - he was
26 trying to assimilate and explain this unexpected event he saw occur literally in a a
27 matter of second. The reality is Mr. Navarrete saw this event (the physical use of
28 force by Officer Valdez) take place in a matter of 2-3 seconds, from a side
perspective. He saw it only one time.

1 (ROA 590.) He then concluded:

2 Navarrete's report is brief and, essentially, factually accurate given what he
3 reasonably could be expected to have perceived at the time. From his testimony,
4 and even in his pre-hearing interviews, it is clear that he believed, initially, Officer
5 Valdez was intending to restrain the inmate. While this was happening, a
6 spontaneous use of force situation occurred. Norelus did come off the wall as
7 Officer Valdez was either properly or improperly attempting to restrain him, but I
8 do not think Mr. Navarrete could be fairly called up to conclude from his 2-3
9 second perception whether Officer Valdez' actions were appropriate or not, or
10 whether the take down was initiated by the wrongful conduct of the inmate or of
11 Officer Valdez. The inmate did rock backwards just prior to physical contact. I do
12 not believe that Mr. Navarrete was in the position to know what Officer Valdez
13 perceived or why this ended as it did. Mr. Navarrete's report is a bland statement
14 of events which are, essentially, true. "When he came off the wall he was
15 resisting." They did end up about 15 feet away - inmate Norelus didn't just flop to
16 the ground. Both officers, ultimately, had to restrain the inmate. Once again, this
17 appears, to me, to be a plain statement that appears, essentially true.

18 (ROA 590-91.)

19 Based on these factual findings, and NDOC's failure to prove otherwise by a
20 preponderance of the evidence, Gentile concluded that Navarrete's dismissal from NDOC be
21 reversed with restoration to his prior position with back pay and benefits. (ROA 591.)

22 **B. Conclusions of Law**

23 NRS 233B.135 sets forth the rules of judicial review district courts must follow. Along
24 with NRS 233B.135, the Court finds that *O'Keefe v. Dept. of Motor Veh.*, 134 Nev. 752 (2018),
25 and *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245, 251(2014) provide guidance that aids the
26 district court's review on the instant petition. Under the review process found in *O'Keefe*, a
27 hearing officer must first determine whether the employee in fact committed the alleged
28 violation. *O'Keefe*, 134 Nev. at 759. When a hearing officer's conclusions of law are closely
related to the findings of fact, those legal conclusions must also be afforded deference and may
not be disturbed if supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 719 P.2d
805 (1986).

Since the hearing officer reviews the facts, the applicable standard for this review is the
preponderance-of-the-evidence standard. See *Nassiri v. Chiropractic Phys. Bd.*, 130 Nev. 245,
251(2014) (holding that in absence of a specific governing statute, the preponderance of the
evidence standard should be applied, as it is the minimum standard to guarantee due process).

1 The hearing officer ultimately concluded, under step one of *O'Keefe* and the preponderance of
2 the evidence standard, that Navarrete did not commit the alleged violations.

3 Petitioner failed to prove the hearing officer's decision violated Petitioner's substantial
4 rights under NRS 233B.135(2). To meet this burden, the petitioner must prove the agency's
5 decision (1) violates the constitution or other statutory provisions, (2) exceeds the agency's
6 statutory authority, (3) is based on an unlawful procedure, (4) constitutes legal error, (5) clearly
7 erroneous based on "reliable probative and substantial evidence on the whole record," or (6)
8 "arbitrary and capricious or characterized by abuse of discretion." NRS 233B.135(2). Petitioner
9 failed to prove any of these bases to reverse the hearing officer's decision.

10 **C. Order**

11 IT IS HEREBY ORDERED ADJUDGED AND DECREED that the hearing officer's
12 ruling is hereby AFFIRMED.

13 DATED this 9th day of October, 2020.

14 
15 DISTRICT COURT JUDGE ZJ

16
17 Respectfully submitted:

18 DATED this 2nd day of October, 2020.

19 LAW OFFICE OF DANIEL MARKS

20 /s/ Nicole M. Young

21 DANIEL MARKS, ESQ.

22 Nevada State Bar No. 002003

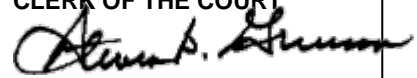
23 NICOLE M. YOUNG, ESQ.

24 Nevada State Bar No. 012659

25 610 S. Ninth Street

26 Las Vegas, Nevada 89101

27 Attorneys for Respondent/Employee



AARON D. FORD
Attorney General
MICHELLE DI SILVESTRO ALANIS (Bar No. 10024)
Deputy Attorney General
State of Nevada
555 E. Washington Ave., Ste. 3900
Las Vegas NV 89101-1068
Tel: (702) 486-3268
Fax: (702) 486-3773
malanis@ag.nv.gov
Attorneys for Petitioner STATE OF NEVADA
ex rel. DEPARTMENT OF CORRECTIONS

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA ex rel. its
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JOSE MIGUEL NAVARRETE, an individual;
STATE OF NEVADA ex rel., its
DEPARTMENT OF ADMINISTRATION,
PERSONNEL COMMISSION, HEARING
OFFICER,

Respondents.

CASE NO: A-19-797661-J

DEPT NO: XVI

CASE APPEAL STATEMENT

1. Name of appellant filing this Case Appeal Statement:

State of Nevada, Department of Corrections

2. Identify the Judge issuing the decision, judgment, or order appealed from:

Honorable Timothy C. Williams, Eighth Judicial District Court, Dept. XVI

3. Identify each appellant and the name and address of counsel for each appellant:

Appellant: State of Nevada, Department of Corrections

Counsel for Appellant:

Michelle Di Silvestro Alanis
Supervising Senior Deputy Attorney General
Office of the Attorney General
555 East Washington Avenue, #3900
Las Vegas, Nevada 89101

(702) 486-3268

- 4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):**

Respondent: Jose Miguel Navarrete

Trial Counsel for Respondent Navarrete

Daniel Marks, Esq.
Law Office of Daniel Marks
601 S. Ninth St.
Las Vegas, Nevada 89101
(702) 386-0536

Counsel for Appellant is without information as to whether or not Respondent has or will retain the same counsel for the appellate proceeding.

Respondent: State of Nevada Department of Administration, Personnel Commission,
Hearing Officer

Counsel for Appellant is without information as to whether or not Respondent will appear in this action and retain counsel for the appellate proceeding.

- 5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):**

N/A

- 6. Indicate whether Appellant was represented by appointed or retained counsel in the District Court:**

Appellant was represented by retained counsel in the district court.

- 7. Indicate whether Appellant is represented by appointed or retained counsel on appeal:**

Appellant is represented by retained counsel on appeal.

- 8. Indicate whether Appellant was granted leave to proceed in forma pauperis, and the date of entry of the District Court Order granting such leave:**

N/A

- 9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information or petition was filed):**

Appellant's Petition for Judicial Review was filed on June 28, 2019.

1 **10. Brief description of the nature of the action and result in the district court, including**
2 **the type of judgment or order being appealed and the relief granted by the district**
3 **court:**

4 State of Nevada, ex rel. Department of Corrections (NDOC), terminated Respondent, Jose M.
5 Navarrete (Employee), a correctional officer, effective April 21, 2017 for various acts of misconduct
6 including dishonesty and allowing the use of excessive force or an act of violence to occur against NDOC
7 policy. Employee appealed his termination to the Department of Administration Personnel Commission
8 pursuant to NRS 284.390. A hearing was held on April 2, 2019 and April 16, 2019 before Hearing Officer
9 Mark Gentile. On May 30, 2019, the hearing officer entered his Findings of Fact, Conclusions of Law
10 Decision and Order (Decision) finding that NDOC did not prove by a preponderance of the evidence that
11 Employee engaged in the misconduct and set aside Employee's termination and reinstated him to his
12 position with full back pay and benefits for the period of dismissal subject to the parties previous
13 stipulation.

14 NDOC filed a Petition for Judicial Review with the District Court. The District Court denied
15 judicial review and affirmed the Hearing Officer's ruling. DPS now appeals the District Court's denial
16 of judicial review and affirmance of the hearing's officer decision to reverse the discipline.

17 **11. Whether the case has previously been the subject of an appeal:**

18 No.

19 **12. Whether the appeal involves child custody or visitation:**

20 No.

21 **13. Whether the appeal involves the possibility of settlement:**

22 This appeal is unlikely to involve the possibility of settlement.

23 DATED: November 12, 2020.

24 AARON D. FORD
25 Attorney General

26 By: /s/ Michelle Di Silvestro Alanis
27 Michelle Di Silvestro Alanis (Bar No. 10024)
28 Supervising Senior Deputy Attorney General

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 12th day of November, 2020; I electronically filed the foregoing **CASE APPEAL STATEMENT** with the Clerk of the Court by using the electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically.

Daniel Marks, Esq,
Law Offices of Daniel Marks
610 S. Ninth St.
Las Vegas, NV 89101

For those parties not registered, service will be made on November 18, 2020 by depositing a copy for mailing in the United States Mail, first-class postage pre-paid, at Las Vegas, Nevada to the following:

Mark Gentile
Hearing Officer
Department of Administration
2200 S. Rancho Dr. Ste. 220
Las Vegas, NV 89102

/s/ Anela Kaheaku

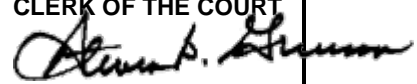
An employee of the State of Nevada
Office of the Attorney General

JUNE 9, 2020

NV DEPT OF CORRECTIONS

Electronically Filed
V. NAVARRETE 1
4/9/2021 8:33 PM

Steven D. Grier
CLERK OF THE COURT



1 CASE NO. A-19-797661-J

2 DOCKET U

3 DEPT. XVI

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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* * * * *

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NEVADA DEPARTMENT OF CORRECTIONS,)

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Petitioner,)

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vs.)

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JOSE NAVARRETE,)

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Respondent.)

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REPORTER'S TRANSCRIPT
OF
PETITION FOR JUDICIAL REVIEW

17

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(TELEPHONIC HEARING)

19

20

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

21

DISTRICT COURT JUDGE

22

23

DATED TUESDAY, JUNE 9, 2020

24

25

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

Peggy Isom, CCR 541, RMR

(702) 671-4402 - CROERT48@GMAIL.COM

Pursuant to NRS 239.053, illegal to copy without payment.

JA 1539

1 APPEARANCES:

2 (PURSUANT TO ADMINISTRATIVE ORDER 20-10, ALL MATTERS IN
3 DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC
4 APPEARANCE)

5 FOR THE PETITIONER:

6
7 OFFICE OF THE ATTORNEY GENERAL

8 BY: MICHELLE ALANIS, ESQ.

9 555 EAST WASHINGTON AVENUE

10 SUITE 3900

11 LAS VEGAS, NV 89101-1068

12 (702) 486-3420

13 MALANIS@AG.NV.GOV

14
15 FOR THE DEFENDANT:

16
17 LAW OFFICE OF DANIEL MARKS

18 BY: DANIEL MARKS, ESQ.

19 610 SOUTH NINTH STREET

20 LAS VEGAS, NV 89101

21 (702) 386-0536

22 (702) 386-6812

23 OFFICE@DANIELMARKS.NET

24 * * * * *

25

Peggy Isom, CCR 541, RMR

(702) 671-4402 - CROERT48@GMAIL.COM

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JA 1540

1 LAS VEGAS, NEVADA, TUESDAY, JUNE 9, 2020

2 2:35 P.M.

3 P R O C E E D I N G S

4 * * * * *

02:35:12 5
6 THE COURT: All right. Good afternoon. This
7 is the time set for the afternoon, June 9, 2020,
8 calendar. We only have one matter on calendar from
9 what I can tell. And I just want to advise everyone

02:35:34 10 I'm sorry for the inconvenience. But we went from
11 9:00 o'clock this morning until about 1:00 o'clock,
12 1:10 p.m. so we had to have some time for a break.

13 MS. ALANIS: That's fine, your Honor.

02:35:47 14 THE COURT: Let's go ahead and place our
15 appearances on the record.

16 MR. MARKS: Your Honor, Daniel Marks for Jose
17 Navarrete the plaintiff.

18 THE COURT: Okay.

02:35:59 19 MS. ALANIS: Good afternoon. Michelle
20 Di Silvestro Alanis on behalf of the Department of
21 Corrections.

22 THE COURT: All right. Once again, good
23 afternoon. And do we want to have this matter
24 reported?

02:36:13 25 MS. ALANIS: Yes. I had indicated previously

Peggy Isom, CCR 541, RMR

(702)671-4402 - CROERT48@GMAIL.COM

Pursuant to NRS 239.053, illegal to copy without payment.

JA 1541

02:36:16 1 that I would.

2 THE COURT: Okay, ma'am. I just wanted to
3 make sure.

4 MS. ALANIS: Okay. Thanks, Judge.

02:36:21 5 THE COURT: Okay. And so all right. I guess,
6 I have a copy of the -- and I've read and reviewed the
7 petitioner's opening brief, respondent's answering
8 brief, and the reply. And, I guess, we'll go ahead and
9 hand the floor to the petitioner.

02:36:39 10 Ma'am.

11 MS. ALANIS: Yes. Thank you, your Honor. As
12 you're aware, we're here on the petition for judicial
13 review of a hearing officer's decision which reversed
14 the dismissal of Mr. Navarrete and reinstated him to
02:36:55 15 his employment. He was dismissed April 21 of 2017.
16 And it was the result of an incident with Correctional
17 Officer Valdez, Mr. Navarrete, and Inmate Ricky
18 Norelus.

19 A very brief description of what has occurred,
02:37:12 20 which I'm sure you're already familiar. On October 9
21 of 2016, Mr. Navarrete -- or Inmate Norelus was
22 allegedly randomly selected for a search, and then was
23 kept on the wall for approximately 11 minute.

24 At about 10 minutes 47 seconds into the video
02:37:31 25 Officer Valdez approaches the inmate from behind with

02:37:36 1 both hands, pushes him into the wall, places his arm
2 around Norelus's neck and brings him to the ground.
3 The video shows there were no restraints out. This
4 wasn't -- the testimony supported this wasn't a
02:37:50 5 technique typically used to restrain. And
6 Mr. Navarrete, as the senior officer, was present
7 during the entire 11 minutes. And it was NDOC's
8 position that he allowed the incident to occur, didn't
9 intervene. And then following the incident wrote a
02:38:09 10 dishonest report.

11 There were five violations that Mr. Navarrete
12 was served with in his specificity of charges, or SOC.
13 Three of those violation were under the Nevada
14 Administrative Code Section 284.650, subsection (1),
02:38:25 15 Activity incompatible with the employee's conditions of
16 employment. Subsection (10), Dishonesty.
17 Section (21), Any act of violence which arises out of
18 or in the course of his performance of his duties,
19 including stalking, threatening conduct, intimidation,
02:38:44 20 assault, or battery.

21 He was also charged with two other violations
22 under AR 339 for false and misleading statements and
23 unauthorized use of force. However, after the hearing,
24 the administrative hearing in this case AR 339 was
02:38:59 25 determined to be invalid. So I won't focus so much on

02:39:03 1 those two administrative regulations unless needed for
2 my argument.

3 At this point we're asking this Court to set
4 aside the hearing officer's decision because it
02:39:14 5 substantially violated the rights of NDOC for several
6 reasons. And I'll go into each one of those.

7 First, we feel that there was clear error to
8 rely on AR 339. As I mentioned after the
9 administrative hearing in this case, the Supreme Court,
02:39:32 10 the Nevada Supreme Court issued its decision in NDOC
11 vs. Ludwick, holding that AR 339 was invalid and of no
12 legal effect as discipline. And to rely on it would be
13 clear error of law warranting remand to the hearing
14 officer.

02:39:50 15 Here, the decision very specifically relies on
16 AR 339. The hearing officer made his factual finding
17 and quotes the specific language found in AR 339.07.9
18 and AR 339.07.17.

19 We did get supplemental briefing to the
02:40:14 20 hearing officer telling him that he couldn't rely on
21 this AR, and that it was clear error to do so. Yet,
22 that is specifically which is still found in his
23 decision.

24 And so on that basis alone NDOC's position is
02:40:30 25 that this matter must be remanded back to the hearing

02:40:34 1 officer because that was clear error.

2 The second reason is the hearing officer
3 violated the statutory provisions and also engaged in
4 clear error by not making findings regarding the
02:40:44 5 violations under the Nevada Administrative Code. As I
6 mentioned, there were three specific violations that
7 Navarette was charged with.

8 And NRS 284.794 Section (1) says that a
9 hearing officer shall determine the evidence on the
02:41:02 10 charges and specifications set forth by the appointing
11 authority in the appropriate documents. Which here
12 would be the SOC, the specificity of charges.

13 Ludwick further held that the hearing officer
14 must address whether the employee's actions constitute
02:41:20 15 violations of NAC 284.650 as listed in the SOC.

16 Here, the SOC listed those three violations
17 under Sections (1), (10) and (21) of NAC 284.650, yet
18 the hearing officer did not make any findings with
19 respect to those violations. He didn't -- aside from
02:41:42 20 the (indiscernible) in his decision where he was
21 listing the facts of the case and acknowledging the
22 fact that the employee was served with the SOC, he
23 never again addresses the NAC violations.

24 Again, in the opposing brief Mr. Navarrete
02:42:00 25 doesn't dispute this. He argued that the charges are

02:42:03 1 redundant. But they're not redundant. These are
2 separate charges under the Nevada Administrative Code.
3 And, in fact, they're the only valid charges in this
4 discipline because the Supreme Court invalidated
02:42:16 5 AR 339.

6 So in order to determine what the -- whether
7 the dismissal was with just cause has to make findings
8 and rule on the NAC violation. But because the hearing
9 officer failed to do this, again, this is clear error
02:42:30 10 and the second reason why this decision should be set
11 aside in its entirety.

12 The third reason is that we believe the
13 hearing officer clearly erred when he used the
14 preponderance of the evidence standard. The hearing
02:42:46 15 officer in a few different areas in his decision said
16 that he is making his findings and conclusions relying
17 on the preponderance of the evidence and as stated in
18 the Nisteri (phonetic) case.

19 The Nisteri case is a licensed revocation
02:43:00 20 hearing. And the correct standard for these
21 disciplinary matters under Chapter 284 is substantial
22 evidence. NRS 284.390 Section (7) requires the hearing
23 officer to determine if the dismissal is supported by
24 just cause.

02:43:20 25 Just cause has been defined or is synonymous

02:43:23 1 with legal cause. And as defined in Southwest Gas
2 Corp. v. Vargas, a discharge for just or good cause is
3 one which is not for any arbitrary, capricious, or
4 illegal reason, and which is one based on facts
02:43:39 5 supported by substantial evidence and reasonably
6 believed by an employer to be true.

7 All the cases that have followed in the recent
8 times, the O'Keefe case, Adams case, the Ludwick case,
9 all of these cases are administrative hearings under
02:43:57 10 NRS 284.390.

11 None of those cases suggest or pulled that
12 preponderance of the evidence is the standard for these
13 administrative hearings.

14 The facts are to be determined whether or not
02:44:12 15 they're substantial evidence to support whether or not
16 the incident occurred or whether or not the employee
17 engaged in misconduct.

18 So the issue for the hearing officer was to
19 determine did substantial evidence support the
02:44:27 20 violations under NAC 284.650 (1) (10) and (21). Was
21 there substantial evidence that he violated the
22 conditions of his employment? Was there substantial
23 evidence that he was dishonest? And was there
24 substantial evidence that he engaged in an act of
02:44:43 25 violence including intimidating, harassment, or

02:44:46 1 assault? And we believe that here the substantial
2 evidence did support the dismissal.

3 There was a video. While it did not have
4 audio, the video depicted the incident involving these
02:44:59 5 two officers and the inmate.

6 We have reports that the officers wrote. We
7 have the administrative investigation as well as the
8 criminal investigation which was included. The
9 criminal investigation report and all that evidence was
02:45:16 10 included within the administrative documents, and
11 included interviews from other inmates.

12 We have substantial evidence that supported
13 that this inmate was singled out, was kept on the wall
14 or an excessive amount of time. That Mr. Navarrete
02:45:31 15 could have intervened. He could have de-escalated the
16 situation. Instead, he patted down the inmate at
17 about -- early on in the video, and then allowed --
18 didn't release him. But then allowed him to stay on
19 the wall and allowed the situation with Officer Valdez
02:45:50 20 to basically escalate. He allowed the situation to
21 occur while Valdez engaged in excessive or unauthorized
22 force.

23 He then, the substantial evidence supported
24 that he wrote a dishonest report. It included false
02:46:04 25 statements, misleading statements, omissions. And that

02:46:07 1 was all supported by the substantial evidence of all
2 the testimony and documentary evidence in this case.

3 So the third reason, again, NDOC believes that
4 the hearing officer erred by using the preponderance of
02:46:20 5 the evidence standard in this administrative hearing
6 which is a higher standard than the substantial
7 evidence.

8 Fourth, we believe the hearing officer's
9 decision was arbitrary, capricious, and clearly
02:46:33 10 erroneous in view of the reliable probative and
11 substantial evidence in the whole record.

12 And so here's where we get into more of the,
13 you know, the factual issues of this case.

14 And, your Honor, I hope you had the
02:46:45 15 opportunity. I believe you did receive a copy of the
16 video when the hearing division submitted the entire
17 record to the Court. I hope that's been available for
18 your Honor.

19 THE COURT: Yes, ma'am.

02:46:57 20 MS. ALANIS: We believe that the decision is
21 arbitrary, capricious, and undisputed because it's just
22 not supported by the substantial evidence in the
23 record.

24 The hearing officer has to state the facts
02:47:09 25 upon which his decision is based. And if he doesn't

02:47:13 1 think testimony is credible, he needs to explain that.
2 And this decision just very summarily talked about the
3 evidence that NDOC presented where we have five
4 witnesses ranging from, you know, a regular line
02:47:28 5 correctional officer, Officer David Wachter. We had a
6 supervisory investigator, Mr. Rod Moore. We had an
7 associate warden Minor Adams. And at the time of the
8 hearing it was two different wardens that testified
9 Warden Perry Russell and Warden Jerry Howell.

02:47:48 10 So the wide range of testimony we had at
11 different levels of the correctional officer level or
12 the command staff there all testified in support that
13 these officers engaged in misconduct, and what was
14 depicted in the video was improper, a violation of the
02:48:05 15 rules, and that the report was also improper and in
16 violation of the rules.

17 The hearing officer found that the employee
18 did not willfully employ or permit the use of force and
19 that CAP search is typically completed in a minute or
02:48:21 20 so, but that, you know, Mr. Navarrete wasn't complying.

21 Yet the substantial evidence just doesn't
22 support the findings that the hearing officer made.
23 The video doesn't support it. The testimony of Moore,
24 Wachter, Adams, Russell and Howell, they all testified
02:48:37 25 that while the inmate was being fidgety or, you know,

02:48:40 1 was -- appeared anxious, he didn't pose a threat. And
2 he if wasn't complying, there was still no need to keep
3 him on the wall. There were other steps that could
4 have been taken. They could have reported him to the
02:48:52 5 sergeant and taken him down to the sergeant's desk to
6 get a notice of charges.

7 The substantial evidence showed that if he
8 was, in fact, noncompliant or a physical threat, these
9 officers wouldn't have walked away numerous times with
02:49:07 10 their back toward the inmate, as can be seen in the
11 video. The POST orders and operating procedures for
12 the prison state that inmates are to be counseled in a
13 discrete and timely fashion. That didn't occur here.

14 As I said, the testimony was that if the
02:49:28 15 inmate wasn't complying, you could restrain him and
16 take him to the sergeant. There is just no evidence in
17 the video or from the testimony that Officer Valdez was
18 going to restrain this inmate. Instead, he just pushed
19 him up against the wall and took him down.

02:49:42 20 Mr. Navarrete was quiet the entire time, was
21 the senior officer in this case and held to a higher
22 standard. That's what the substantial evidence at this
23 hearing supported. And the decision just seems to
24 completely fail or address -- (telephonic audio
02:49:59 25 glitch) -- what this is in evidence.

02:50:02 1 I'm sorry. Did somebody say something? It
2 kind of stopped on my end.

3 THE COURT: No, ma'am. You're fine.

4 MS. ALANIS: Okay. Okay. Sorry.

02:50:10 5 The substantial evidence also shows that
6 Mr. Navarrete was dishonest. The hearing officer found
7 that he didn't knowingly and intentionally submit a
8 report, but the hearing officer also then contradicts
9 and says that there were no signs that Valdez had
02:50:28 10 restraints in his hands and that Valdez approached
11 Norelus. As he approached him, the inmate's hands
12 remained on the wall.

13 Well, in Mr. Navarette's report he said at
14 approximately 0645 hours Inmate Norelus, No. 1104257
02:50:48 15 came off the culinary wall while CO Valdez was
16 attempting to restrain him resulting in spontaneous use
17 of force. That is completely contradictory to what the
18 hearing officer sightings were and a misrepresentation
19 of what had occurred.

02:51:06 20 The testimony also supported that his report
21 lacked details, and that in reporting a use of force
22 there should have been more detail regarding the 11
23 minutes that this inmate stood on the wall.

24 The hearing officer also incorrectly found
02:51:21 25 that Mr. Navarette's perception of the force when he

02:51:25 1 reported it in his incident report was based on two to
2 three seconds. That was complete error. Mr. Navarrete
3 was present for the entire 11 minutes. He stood there.
4 He watched. He engaged with the inmate.

02:51:38 5 So for him to find that this was perceived off
6 of two or three seconds was complete error. He didn't
7 just walk up suddenly when the use of force occurred.
8 He was there throughout the incident.

9 I knew there were statements by the hearing
02:51:53 10 officer that the supervisor that was on duty that
11 night, I guess, thought the report was okay. That was
12 Officer Willett, or, Sergeant Willett.

13 The testimony said that Sergeant Willett only
14 reviewed a report for grammar, for flow. It wasn't his
02:52:14 15 job to determine the facts or to rewrite the report for
16 the employee. He just has to make sure that they
17 filled out the report, it flows, makes sense, and they
18 can submit it. He was not part of the investigative
19 process.

02:52:29 20 The hearing officer's reliance on his soul
21 searching was also error. Again, the substantial
22 evidence, you know, supported that the employee engaged
23 in misconduct. He did not need to soul search to make
24 those findings.

02:52:43 25 And the substantial evidence also supported

02:52:47 1 that this inmate was singled out. Officer Wachter
2 testified at the hearing that Valdez -- that he said
3 Valdez always had to get in the last word. He had had
4 to counsel him in the past. There were investigations
02:53:02 5 with inmates in the criminal investigation. All of
6 those inmates stated that Inmate Norelus had been
7 singled out. That they were picking on him. In fact,
8 one inmate said that the officers were actually
9 singling out African Americans inmates at the prison
02:53:23 10 during that time.

11 The substantial evidence also showed that
12 while Mr. Navarrete testified they were cracking down
13 on contraband, the video shows that no other inmates
14 were pulled out of this line. The last inmate is taken
02:53:39 15 to be searched at about eight seconds in. The culinary
16 door closes at about six minutes 20 seconds or 19
17 seconds.

18 During that six-minute period 120 inmates
19 leave the culinary. So if they were truly supposed to
02:53:54 20 be checking for contraband, what was happening during
21 that time? Mr. Navarrete wasn't searching and doing
22 his search and escort function of his duty. So that
23 further supports the other inmates' statements in the
24 criminal investigation that this particular inmate
02:54:11 25 Mr. Norelus was being singled out.

02:54:14 1 So the substantial evidence supports the three
2 NAC violations. The first being that the conditions of
3 his employment with violated. Mr. Navarrete was
4 supposed to comply with civil rights, administrative
02:54:28 5 regulations, operating procedures, POST orders for his
6 position. He is not supposed to be singling out, you
7 know, patting down, but not releasing the inmates,
8 keeping the inmates on the wall for an excessive amount
9 of time. All of the administrative rules and operating
02:54:47 10 procedures for his job he was in violation of. Even
11 though he didn't put hands on the inmate, he still
12 allowed that to occur.

13 And, again, as I already mentioned with the
14 dishonesty the substantial evidence supported that
02:55:03 15 NAC 280.650 Section (10) violation. We have several
16 people testifying at the hearing, again, from the
17 officer level all the way up to a warden, that the
18 statements made in that report were false, were
19 misleading.

02:55:21 20 They all said that it did appear that the
21 inmate was resisting. And we have testimony from
22 Warden Russell the omission is a deception. So not
23 only were there false statements in the report, but the
24 complete lack of detail and the facts leading up to
02:55:37 25 this use of excessive force were omissions. And as a

02:55:41 1 senior officer, Mr. Navarrete should have reported
2 those.

3 Lastly, the NRS 284.650 Section (21). Again,
4 as a senior officer, he could have prevented the force.

02:55:51 5 The substantial evidence and testimony from Officer
6 Wachter said that as the senior officer he should have
7 intervened. Associate Warden Adams says he should have
8 intervened. Investigator Moore said it was part of his
9 job. As senior officer those -- the Assistant Warden

02:56:09 10 Adams and Russell said that he should have prevented
11 this use of force.

12 Again, the decision just completely -- the
13 hearing officer's decision completely fails to address
14 all of the evidence in the record. And not only does
02:56:21 15 it fail to address it, but the substantial evidence
16 supports that Mr. Navarrete engaged in misconduct.

17 The last issue isn't a reason for this Court
18 to reverse the hearing officer's decision. But the
19 employee did raise in their answering brief an issue
02:56:41 20 that's not appropriately before the Court. And that
21 was whether NDOC had a proper extension of time to
22 pursue this discipline. We believe that argument is
23 without merit and improperly raised. It could have
24 been addressed in a cross petition for judicial review.

02:56:57 25 The hearing officer didn't base his decision

02:57:01 1 on that. And also NDOC did, in fact, have a timely
2 extension to serve Mr. Navarrete with the discipline.

3 So based on the four reasons previously
4 discussed, NDOC feels that the substantial rights --
02:57:13 5 the substantial rights have been (indiscernible) by the
6 hearing officer's decision, and we would ask that it be
7 set aside in his entirety. And either the decision to
8 terminate be upheld or remanded to the hearing officer
9 for a ruling in accordance with the law and evidence in
02:57:28 10 this case.

11 THE COURT: Okay, ma'am. Thank you.

12 MR. MARKS: Your Honor, can I proceed?

13 THE COURT: Yes, you may, sir.

14 MR. MARKS: Okay. Your Honor, let's start
02:57:39 15 looking first macro --

16 (Reporter clarification)

17 THE COURT: That the --

18 MR. MARKS: (indiscernible) this is not and
19 then we'll get into more of the minute details.

02:57:49 20 THE COURT: Mr. Marks, can you say that over
21 again because I think my court reporter missed it.

22 MR. MARKS: I said let's look at macro --
23 macro picture of what this is and what this isn't
24 first. And then we'll get into the details.

02:58:06 25 This happened in 2016. It was at the hearing

02:58:11 1 that we were involved in. This isn't a criminal case.
2 This is the sealable hearing officer case in front of
3 Mark Gentile.

4 There were no inmates called. There was no
02:58:22 5 evidence of any racial profiling, racial bias, or
6 anything racial at all. And you have the video just as
7 Mark Gentile did. So when counsel talks about warden
8 this and warden that, the hearing officer could review
9 the video and see what happened and what didn't happen.

02:58:50 10 And this isn't like what's on the news. This
11 isn't an Eric Gardner, a Floyd, a Michael Brown. This
12 is a situation where you had a convicted felon, he
13 actually had gone and tried to ax a woman. He was in
14 prison for a felony. The prisoner has not the same
02:59:16 15 rights, obviously, as someone on the street. And they
16 can be stopped and patted down and searched any time.
17 That's not considered harassment in the prison.

18 There was -- there was a problem of -- to us
19 it sounds minor -- stealing food from the cafeteria and
02:59:38 20 bringing it out. And my client testified the reason
21 that's a problem, it's not like you're in high school
22 doing it because that's traded for contraband, for
23 drugs, and for other things in the prison.

24 Unlike the officers on the street, the
02:59:57 25 correction officer has no gun, has no weapon.

03:00:00 1 Essentially he's got his hands, a baton, and pepper
2 spray. So when they keep talking about use of force,
3 this isn't force like we're seeing people hurt, maimed,
4 killed on the street.

03:00:15 5 This was a bungled attempt to cop the inmate,
6 not by my client but by the other Officer Valdez.
7 There were two officers. One was a CO1. My client was
8 the CO2. The evidence, contrary to what my friend the
9 attorney general is saying, my client was not a

03:00:35 10 supervisor in the classic sense. He did not supervise.
11 He had more experience, but he was never the supervisor
12 of the other inmate. That's by their own organization
13 chart.

14 The other correction officer tried to cuff the
03:00:53 15 inmate and a scuffle ensued. My client did nothing.
16 Did not use force or even touch the inmate until they
17 were on the ground. And he used a reasonable use of
18 force necessary to cuff the inmate off. And then the
19 inmate was taken to the sergeant and then the
03:01:15 20 infirmary.

21 You kept looking for what I heard use of
22 force. I keep looking on the video. Did he hit his
23 head to the ground? Did he kick him? Did he punch
24 him? No. My client used no force.

03:01:29 25 Here, unlike the stuff on TV, these 8 minutes

03:01:33 1 and 10 minutes, the hearing officer found the force was
2 spontaneous. It was a split second when Valdez tried
3 to cuff up the inmate. And from where my client was
4 standing, you could see on the video there is
03:01:48 5 absolutely no way he could stop or do anything. That's
6 why the hearing officer ruled against Valdez in a
7 separate hearing and ruled for my client. Because he
8 took into account the unique circumstances of each
9 case.

03:02:05 10 We actually, after the Valdez case, filed a
11 motion to recuse the hearing officer. And he already
12 made up his mind. He declined and said, no, I can be
13 fair and open minded.

14 We actually had other evidence that they
03:02:21 15 didn't have at the first hearing. During the criminal
16 case, we got the second tape which you should have,
17 your Honor. And in that tape, the inmate is laughing
18 after the incident. He's not -- not -- he's not hurt.
19 He's laughing. And he says, you should better train
03:02:39 20 your correction officer. You are going to pay for my
21 kid's college. He's laughing and joking. And we
22 attached the medical reports which showed he was
23 unharmed.

24 So this is two guys on the ground in a tussle,
03:02:53 25 and then one is restrained. Nobody is hurt. There's

03:02:57 1 no (indiscernible). This isn't like what we're seeing
2 on TV with unarmed people being killed by police
3 officers. So that's the macro picture.

4 In terms of the law, I think my opponent has
03:03:11 5 the law backwards. If there's substantial evidence to
6 support Hearing Officer Gentile, the district court
7 judge, meaning your Honor, is supposed to affirm even
8 if you have -- and I don't think you needed to watch
9 the video -- a different opinion. Because the facts
03:03:31 10 are supposed to be deferred if there is substantial
11 evidence, which there is, to the hearing officer.

12 The hearing officer heard the wardens. Then
13 he called a number of correction officers that also
14 included the lieutenant. The hearing officer had the
03:03:47 15 videos and could make his own decision from the videos.
16 The hearing officer had, obviously, my client. They
17 never called the inmate. And they never called Valdez.

18 The hearing officer had the video and he had
19 our client. And we called a number of other correction
03:04:07 20 officers to testify what they would do in that -- in
21 this situation. And we called our client's sergeant
22 who was promoted to lieutenant who testified he saw
23 nothing wrong with what happened and believed the
24 report was true.

03:04:23 25 Not just that it was grammatically correct.

03:04:26 1 He believed it was true. But nobody can prove anybody
2 here because Hearing Officer Gentile, I'm sure you
3 know, is a very experienced defense attorney. He tries
4 jury trials. He's been around a really long time. He
03:04:40 5 knows how to analyze evidence. He watched the tape
6 numerous, numerous times. The stay was also -- there's
7 a slow motion version of the tape.

8 The Supreme Court actually has said in the
9 Cotter Graham case that officers have to make
03:05:00 10 split-second decisions. And it's not improper for
11 judges to second guess based on in the comfort of their
12 chambers. Yeah, we did that. We second guessed
13 Navarette relative to (indiscernible) because we
14 watched that video probably 12 times. And every time I
03:05:17 15 said I think this all supports my client. That it
16 actually goes against what the US Supreme Court said.
17 Because unlike judges and lawyers, often law
18 enforcement has to make a split-second decision and
19 it's -- you can't get into a slow motion Monday morning
03:05:35 20 quarterback. But we did it anyway. We watched it 12
21 different times.

22 So we think if you watch both videos and read
23 the hearing officer's decision, which is very
24 comprehensive, he took a lot of time and effort to do
03:05:52 25 it, and he distinguished between the two correction

03:05:55 1 officers, which is what he's supposed to do, individual
2 justice, not just blanket, all law enforcement is never
3 right or wrong. It depends on the circumstances in the
4 case, that the substantial evidence to affirm the
03:06:11 5 decision.

6 Now I want to talk briefly about some legal
7 points. Because, again, I think my friend the deputy
8 attorney general is making this a lot harder than it
9 has to be.

03:06:22 10 The Nevada Supreme Court has a case, O'Keefe.
11 That is the leading case on employee discipline in the
12 state of Nevada for public employees. The Court knows
13 regardless, Southwest Gas is a private employer. It
14 has nothing to do with this. It has absolutely nothing
03:06:43 15 to do with the public sector employment.

16 Under O'Keefe, there's a three-part test that
17 we all agreed at the hearing part one is the only part
18 that applied. This is really much simpler than my
19 opponent is making it.

03:07:01 20 Under part one, the sole inquiry is did the
21 conduct happen or not. So my client would -- whether
22 you call it an AR or an NAC was charged essentially
23 with two major violations. One was excessive use of
24 force or letting excessive use of force take place, and
03:07:22 25 the other was dishonesty.

03:07:24 1 We never got to O'Keefe two and three because

2 we conceded if he did what they said he did, it would

3 be right to look at O'Keefe two or three which talks

4 about lesser penalties. This was straight was the

03:07:40 5 light red? Was the light green? It's a straight up, a

6 factual analysis.

7 But under that factual analysis, you can't

8 then have substantial evidence. Because O'Keefe is

9 telling the hearing officer and the district court

03:07:55 10 judges did it happen. And under our law, did it happen

11 or not is preponderance. It needs a lesser than

12 preponderance standard. You'd be violating O'Keefe

13 because you'd be saying if something's substantial

14 evidence that means it's less than 50 percent true that

03:08:16 15 it happened. And that's not compatible with O'Keefe.

16 So you have to use the other administrative

17 law case that the Supreme Court has called out, and

18 that's Lucero. And that's very compatible because the

19 inquiry for O'Keefe part one is not really the

03:08:33 20 substantial evidence that he did it. It's did he do it

21 or not? What's more likely than not? He's entitled to

22 a de novo hearing under the state personnel system

23 under 14th Amendment property interest in his job. Did

24 he or did he not commit excessive force?

03:08:49 25 The hearing officer based on all the

Peggy Isom, CCR 541, RMR

(702)671-4402 - CROERT48@GMAIL.COM

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03:08:52 1 witnesses, all the evidence, our client was on the
2 stand extensively, he was not only cross examined by
3 the attorney generals office, but Hearing Officer
4 Gentile read the transcript, asked him numerous
03:09:08 5 questions, and made him show, you know, various things.

6 There's an issue, did Valdez use a chokehold
7 or not. Chokeholds are not allowed. Officer
8 Navarrete, our client, on me, showed this is a
9 chokehold. This is what Valdez did. Which was
03:09:25 10 basically a bungled attempt to cuff him up and maybe
11 put him in like a force collar or something.
12 Definitely was not a chokehold.

13 But he was essentially cross examined by the
14 hearing officer. There is nothing hidden here. There
03:09:41 15 is nothing. There is no place for Navarette to hide.
16 There was an extensive video, two videos. He was on
17 the stand. He was subject to cross-examine by the AG
18 and by Officer -- by Hearing Officer Gentile.

19 And the hearing officer found he was credible,
03:09:59 20 that he did not use excessive force, that he could not
21 have stopped Valdez from cuffing the inmate because
22 that was spontaneous. He didn't -- the inmate was
23 never hurt. The only time Navarette touched the inmate
24 was to help Valdez cuff him when they were on the
03:10:18 25 ground. Here the inmate was heard laughing and joking

03:10:22 1 about what happened.

2 He did find contraband. The video did show
3 the inmate making rude gestures and taking his hand off
4 the wall.

03:10:34 5 Navarette had a clean, no-discipline record.
6 There were no complaints. There was no evidence that
7 he did anything or there was any racial, or other bias.
8 So the hearing officer under O'Keefe One rules in his
9 favor.

03:10:51 10 The whole AR issue gets the state nowhere.
11 The AR issue in Ludwick says essentially you can't fire
12 someone who is using AR. Meaning if the hearing
13 officer had ruled against us using an AR that has not
14 been properly processed.

03:11:12 15 Whether it would have to be remand, but
16 essentially the Hearing Officer Gentile said whether he
17 used (indiscernible).

18 Under O'Keefe, everyone agrees he had to
19 figure out whether there is excessive force. Whether
03:11:29 20 it was an AR or NAC. So you can't
21 (indiscernible) somebody for an argument that if the
22 Supreme Court has ruled is invalid. So that's a
23 nonstarter.

24 But we tried the case on the merits
03:11:44 25 essentially. We didn't try it on a procedural

03:11:47 1 technicality. We said this is a one-shot deal. He
2 didn't do what you're accusing him of doing. He's an
3 innocent man falsely accused. He went through a
4 criminal trial in front of a jury on that same theory
03:12:01 5 and prevailed.

6 And in our case we went to the hearing officer
7 and prevailed that we did not use excessive force.

8 And under our system, the winning isn't the
9 last word. You can appeal and go to your hearing
03:12:16 10 (indiscernible) you can prove you didn't do what they
11 said you did and prevail, and that's what officer
12 Navarette did.

13 So, your Honor, it's really as simple as that.

14 You don't have to reinvent the wheel. At this
03:12:30 15 stage all you have to determine is, there's substantial
16 evidence in the record that Navarette did not use
17 excessive force. He did not lie or was not dishonest
18 on his report, based on his own lieutenant and the
19 hearing officer's conclusion. And based on that, this
03:12:52 20 should be affirmed.

21 I would point out the decision came down a
22 year ago. It's now taken over a year to get where we
23 are. You had previously ordered Navarette back to
24 work, and he is back to work. Thankfully. The state
03:13:12 25 has still never paid the back pay or the attorney's

03:13:15 1 lien that you had previously ruled in our favor.

2 They claim there's problems with the state --
3 Whatever they call it -- state payroll. And this is
4 pre-pandemic. There is just no excuse that the state
03:13:32 5 can just hold this money. This has gone on now
6 probably over six months.

7 So I know you're really busy, but if we could
8 get an expedited decision so we can finally put this to
9 bed, get him -- get us our money, him his money, and
03:13:50 10 his PERS that he's entitled to, I would appreciate it.

11 And I don't know if you have any other
12 questions. I know it's been a long day. I don't want
13 to beat a dead horse. I think this is really a simple
14 and relatively easy decision based on the record that
03:14:07 15 the hearing officer Gentile made.

16 THE COURT: Okay. Mr. Marks, thank you, sir.

17 And, ma'am, you get the last word.

18 MS. ALANIS: Thank you, your Honor. Just few
19 points here.

03:14:24 20 Mr. Marks noted that no inmates were called at
21 the hearing. And I just want to point out, even though
22 I know it's in the record, the criminal investigation
23 was admitted into evidence. And that evidence included
24 the inmates, the four inmates, Mr. Norelus and the
03:14:46 25 three other inmates Williams, White, and Jackson

03:14:51 1 included a summary of the investigation with those
2 inmates.

3 And so while they weren't called at the
4 hearing, we do have that information from the
03:14:59 5 investigation which was admitted into evidence.

6 Further, Supervisory Investigator Rod Moore
7 did testify at the hearing at this hearing, Inmate
8 Norelus was singled out. And he was singled out in
9 this instance. So there was evidence of that at the
03:15:20 10 hearing. And when you look at this video, it becomes
11 abundantly clear that once the last inmate is selected,
12 and once we have Inmate Norelus on the wall, no other
13 inmates are searched.

14 And Inmate Norelus is the only one to have
03:15:35 15 been kept on this wall. We don't need the other
16 inmates to testify. You can see very clearly in this
17 video that he's the only one still standing there after
18 11 minutes. And while he fidgeted or, you know, maybe
19 he didn't have his hands in the right spot, the white
03:15:52 20 inmate next to him also had to have his hands moved,
21 and, yet, he was patted down and released.

22 Secondly, we have Mr. Marks talked about this
23 isn't what's depicted in the news and so forth. We
24 understand this is a prison. You know, I deal with
03:16:10 25 this all the time as part of my job here.

03:16:12 1 I'm not saying that Officer Navarrete cannot
2 select an inmate for a pat down or random search. I'm
3 not saying he can't be placed on the wall. But you
4 still have to do those things according to the proper
03:16:30 5 policies and procedures without violating an
6 individual's rights. Even if that person is an inmate.

7 And what we have here is these two officers
8 placed this inmate on the wall. The testimony
9 supported that the length of time he was kept on the
03:16:46 10 wall with his hands above his head was excessive.

11 There was no reason for him to be on the wall.
12 If he was fidgety, if he was not compliant, there were
13 other steps that could have been taken. They could
14 have restrained him properly, not the way that they're
03:17:04 15 claiming that they tried to restrain him. They could
16 have restrained him. Brought him to the sergeant.
17 They could have -- the fact that they found contraband
18 by having extra food in his sack lunch, if that's
19 found, the testimony was you give the inmate a notice
03:17:19 20 of charges.

21 Basically, they're in violation of their
22 discipline there at the prison. And to send them along
23 their way, or you bring them down to the sergeant to
24 issue the notice of charges. Don't keep him on the
03:17:31 25 wall ten minutes because there are other duties that

03:17:34 1 need to be done including searching other inmates, like
2 they should have been doing.

3 So while I'm not saying that this is what's on
4 the news, we have to acknowledge that officers still
03:17:46 5 have to abide by rules and laws. Just because the
6 inmate is in prison doesn't mean you can push him up
7 against the wall for no reason, keep him on the wall
8 for no reason, and take him down for no reason. And
9 certainly it doesn't encourage officers to write false
03:18:02 10 reports.

11 You know, that was the testimony we had. Is
12 that the associate warden and the warden have to be
13 able to rely on these reports. It's upon the officers
14 to be truthful and to properly report things. And
03:18:16 15 Officer Navarrete did not do that.

16 He made false statements, omissions. He
17 didn't properly report to the supervisor or to the
18 sergeant about what was occurring. He just did not
19 follow the administrative regulation, the operational
03:18:31 20 procedures, civil rights, he just did not follow the
21 rules that were in place for him.

22 Mr. Marks said that when Valdez was trying to
23 cuff him, you know, there was a scuffle. That's just
24 the point. He was not trying to cuff him. Even the
03:18:49 25 hearing officer found that he did not cuff him. There

03:18:52 1 was no sign of restraints. There was no sign that he
2 was actually trying to cuff him.

3 This was about a 11-minute occurrence, these
4 two officers keeping the inmate on the wall and
03:19:03 5 harassing him. Nowhere in the substantial evidence in
6 the testimony does it support what occurred on this
7 video.

8 As far as, you know, he couldn't do anything
9 to stop the force, he could. That was what the
03:19:18 10 evidence and testimony supported as well.

11 Administrative -- the administrative
12 regulations of the prison and the operational
13 procedures support that as a senior officer, it's
14 required to supervise the other officers. He trains
03:19:35 15 them. Sometimes he has to act as a sergeant if there
16 isn't another one available that day. He has a higher
17 responsibility. That was the testimony at the hearing.

18 And he allowed -- could have intervened. The
19 testimony supported he could have intervened. He could
03:19:50 20 have de-escalated the situation. More importantly, he
21 was the one would patted down Inmate Norelus. So it
22 was within his control to release him. But instead, he
23 decided, Mr. Navarette, to keep Norelus on the wall and
24 allow this situation to continuously escalate with
03:20:08 25 Officer Valdez, where we can see waiting it off to the

03:20:12 1 point where finally he pushes the inmate into the wall.
2 The substantial evidence supported that he could have
3 done something.

4 Again, it wasn't a split second decision.

03:20:21 5 This went on for 11 minutes. This wasn't two or three
6 seconds of him observing what occurred. This was
7 something that escalated over about 11 minutes.

8 And, you know, with all due respect I'm not
9 trying to make this harder than its supposed to be.

03:20:37 10 But O'Keefe, I acknowledge, has three steps. And we --
11 the hearing officer did make the determination under
12 step one. We never reached step two or three. That is
13 very clear from the hearing officer's decision.
14 However, step one of whether or not the conduct
03:20:54 15 occurred is based on substantial evidence.

16 O'Keefe never mentions preponderance of the
17 evidence. The statute that governs administrative
18 decisions for disciplinary matters do not state that
19 the stand is preponderance of the evidence. It is just
03:21:14 20 cause.

21 And while Southwest Gas is not a state
22 dismissal, it is an employment matter and talks about
23 just cause and the substantial evidence to support the
24 facts.

03:21:26 25 O'Keefe also references the substantial

03:21:30 1 evidence. So it is very simple in that preponderance
2 of the evidence is nowhere in play in the governing
3 statutes and case law on these administrative cases.

4 The Nisteri case, again, is not a disciplinary
03:21:44 5 matter. It is a license revocation hearing.

6 And, you know, again, the substantial evidence
7 we believe showed that, you know, the choke -- it was a
8 chokehold. He took his arm and put it around his neck
9 and took him down. We have that testimony from

03:22:00 10 probably at least three different people: Investigator
11 Moore, Assistant Warden Adams, and, I believe, it was
12 Warden Russell.

13 This decision is filled with error. Again,
14 the soul searching. We did not need the hearing
03:22:17 15 officer to soul search on whether or not this was a
16 false report. He had to make the decision based on the
17 substantial evidence. And the substantial evidence
18 supported not only was it a violation under NAC
19 284.650(1) and -- 21 -- but also under number (10) with
03:22:34 20 the dishonesty.

21 His reliance on AR 339, again, the hearing
22 officer did specifically use the AR 339 language. And
23 while Mr. Marks says that it's only if we relied on
24 discipline for that issue, that's not what Ludwick
03:22:53 25 says. Ludwick says if the hearing officer relies on

03:22:56 1 AR 339 for any purpose, it is clear error. And the
2 hearing officer did that. We told him not to rely on
3 AR 339, but he cited the specific language of those
4 regulations.

03:23:08 5 He was required to make a ruling on the NAC
6 violations. And he was required to look at the
7 substantial evidence in making that ruling.

8 The criminal trial is completely irrelevant in
9 this case. The substantial evidence supports that
03:23:25 10 Mr. Navarette engaged in the misconduct. And while
11 we're not here on the attorneys lien and all that jazz,
12 you know, that's not what we're here for. We're only
13 here for the merits on the petition for judicial
14 review. NDOC has complied and done their part.

03:23:40 15 And central payroll -- the central payroll, I
16 don't know what's happening there. So I just wanted to
17 address to your Honor, you know, my client is doing
18 what they have to do. And I don't know what's
19 happening with the other state agencies. I have
03:23:54 20 followed up for Mr. Marks on that issue.

21 So with that, we will, again, ask that your
22 Honor set aside the hearing officer's decision and
23 either cancel the dismissal or remand to the hearing
24 officer for reasons that we've already stated.

03:24:13 25 THE COURT: All right. Ma'am, thank you.

03:24:15 1 And, counsel, what I'm going to do, I'm going
2 to take another look at the record. I'm not really
3 that backlogged right now; although, we've been very
4 busy. Maybe it's because I have more time. Maybe it's
03:24:25 5 because I'm not in trial right now. That could be it
6 because we haven't had a trial, I guess, in probably 90
7 days or so.

8 And it doesn't look like we'll have one for
9 another six months maybe, somewhere give or take. But
03:24:40 10 we'll get you out a decision relatively quick.

11 And everyone enjoy your day.

12 MS. ALANIS: Thank you.

13 MR. MARKS: Thank you, your Honor.

14 THE COURT: Okay.

03:24:50 15

16

17

18

19 (Proceedings were concluded.)

20

21 * * * * *

22

23

24

25

REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED
MATTER AT THE TIME AND PLACE INDICATED, AND THAT
THEREAFTER SAID STENOGRAPHY NOTES WERE TRANSCRIBED INTO
TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION
AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE
AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
NEVADA.

/s/ Peggy Isom
PEGGY ISOM, RMR, CCR 541

Peggy Isom, CCR 541, RMR

(702) 671-4402 - CROERT48@GMAIL.COM

Pursuant to NRS 239.053, illegal to copy without payment.

JA 1577

MR. MARKS: [6] 3/16 19/12 19/14 19/18 19/22 38/13 MS. ALANIS: [9] 3/13 3/19 3/25 4/4 4/11 11/20 14/4 30/18 38/12 THE COURT: [15] 3/6 3/14 3/18 3/22 4/2 4/5 11/19 14/3 19/11 19/13 19/17 19/20 30/16 37/25 38/14	36/19 284.794 [1] 7/8 2:35 [1] 3/2 3 339 [10] 5/22 5/24 6/8 6/11 6/16 8/5 36/21 36/22 37/1 37/3 339.07.17 [1] 6/18 339.07.9 [1] 6/17 3420 [1] 2/12 386-0536 [1] 2/21 386-6812 [1] 2/22 3900 [1] 2/10 4 47 [1] 4/24 486-3420 [1] 2/12 5 50 percent [1] 26/14 541 [2] 1/25 39/18 555 [1] 2/9 6 610 [1] 2/19 6812 [1] 2/22 7 702 [3] 2/12 2/21 2/22 8 89101 [1] 2/20 89101-1068 [1] 2/11 9 90 [1] 38/6 9:00 o'clock [1] 3/11 : :SS [1] 39/2 A abide [1] 33/5 ABILITY [1] 39/11 able [1] 33/13 about [16] 3/11 4/24 10/17 12/2 16/15 16/16 20/7 21/2 25/6 26/4 28/1 31/22 33/18 34/3 35/7 35/22 above [1] 32/10 absolutely [2]	22/5 25/14 abundantly [1] 31/11 accordance [1] 19/9 according [1] 32/4 account [1] 22/8 ACCURATE [1] 39/11 accused [1] 29/3 accusing [1] 29/2 acknowledge [2] 33/4 35/10 acknowledging [1] 7/21 act [3] 5/17 9/24 34/15 actions [1] 7/14 Activity [1] 5/15 actually [7] 16/8 20/13 22/10 22/14 24/8 24/16 34/2 Adams [6] 9/8 12/7 12/24 18/7 18/10 36/11 address [5] 7/14 13/24 18/13 18/15 37/17 addressed [1] 18/24 addresses [1] 7/23 administrative [20] 2/2 5/14 5/24 6/1 6/9 7/5 8/2 9/9 9/13 10/7 10/10 11/5 17/4 17/9 26/16 33/19 34/11 34/11 35/17 36/3 admitted [2] 30/23 31/5 advise [1] 3/9 affirm [2] 23/7 25/4 affirmed [1] 29/20 African [1] 16/9 after [5] 5/23 6/8 22/10 22/18 31/17 afternoon [4] 3/6 3/7 3/19 3/23 AG [1] 27/17 AG.NV.GOV [1] 2/13 again [18] 3/22 7/23 7/24 8/9 11/3 15/21 17/13 17/16 18/3 18/12 19/21 25/7 35/4 36/4 36/6 36/13 36/21 37/21	against [5] 13/19 22/6 24/16 28/13 33/7 agencies [1] 37/19 ago [1] 29/22 agreed [1] 25/17 agrees [1] 28/18 ahead [2] 3/14 4/8 ALANIS [2] 2/8 3/20 all [28] 2/2 3/6 3/22 4/5 9/7 9/9 10/9 11/1 11/1 12/12 12/24 16/5 17/9 17/17 17/20 18/14 20/6 24/15 25/2 25/17 26/25 27/1 29/15 31/25 35/8 37/11 37/25 39/5 allegedly [1] 4/22 allow [1] 34/24 allowed [8] 5/8 10/17 10/18 10/19 10/20 17/12 27/7 34/18 alone [1] 6/24 along [1] 32/22 already [4] 4/20 17/13 22/11 37/24 also [16] 5/21 7/3 12/15 14/5 14/8 14/20 14/24 15/21 15/25 16/11 19/1 23/13 24/6 31/20 35/25 36/19 although [1] 38/3 always [1] 16/3 Amendment [1] 26/23 Americans [1] 16/9 amount [2] 10/14 17/8 analysis [2] 26/6 26/7 analyze [1] 24/5 another [3] 34/16 38/2 38/9 answering [2] 4/7 18/19 anxious [1] 13/1 any [8] 5/17 7/18 9/3 20/5 20/16 28/7 30/11 37/1 anybody [1] 24/1 anything [4] 20/6 22/5 28/7 34/8	anyway [1] 24/20 appeal [1] 29/9 appear [1] 17/20 APPEARANCE [1] 2/3 appearances [2] 2/1 3/15 appeared [1] 13/1 applied [1] 25/18 appointing [1] 7/10 appreciate [1] 30/10 approached [2] 14/10 14/11 approaches [1] 4/25 appropriate [1] 7/11 appropriately [1] 18/20 approximately [2] 4/23 14/14 April [1] 4/15 April 21 [1] 4/15 AR [19] 5/22 5/24 6/8 6/11 6/16 6/17 6/18 6/21 8/5 25/22 28/10 28/11 28/12 28/13 28/20 36/21 36/22 37/1 37/3 AR 339 [4] 8/5 36/21 36/22 37/1 arbitrary [3] 9/3 11/9 11/21 are [12] 2/2 7/25 8/1 9/9 9/14 13/12 22/20 23/10 27/7 29/23 31/13 32/25 areas [1] 8/15 argued [1] 7/25 argument [3] 6/2 18/22 28/21 arises [1] 5/17 arm [2] 5/1 36/8 around [3] 5/2 24/4 36/8 as [28] 4/11 5/6 6/8 6/12 7/5 7/15 8/17 9/1 10/7 10/7 13/10 13/14 14/11 17/13 17/25 18/4 18/6 18/9 20/6 20/15 29/13 29/13 31/25 34/8 34/8 34/10 34/13 34/15 aside [5] 6/4 7/19 8/11 19/7 37/22
---	--	--	--	--

<p>A</p> <p>ask [2] 19/6 37/21 asked [1] 27/4 asking [1] 6/3 assault [2] 5/20 10/1 Assistant [2] 18/9 36/11 associate [3] 12/7 18/7 33/12 at [32] 4/24 6/3 10/16 12/7 12/10 13/22 14/13 16/2 16/9 16/15 16/16 17/16 19/22 19/25 20/6 22/15 25/17 26/3 29/14 30/20 31/3 31/7 31/7 31/9 31/10 32/22 34/17 36/10 37/6 38/2 39/7 39/9 attached [1] 22/22 attempt [2] 21/5 27/10 attempting [1] 14/16 attorney [5] 2/7 21/9 24/3 25/8 27/3 attorney's [1] 29/25 attorneys [1] 37/11 audio [2] 10/4 13/24 authority [1] 7/11 available [2] 11/17 34/16 AVENUE [1] 2/9 aware [1] 4/12 away [1] 13/9 ax [1] 20/13</p>	<p>basis [1] 6/24 baton [1] 21/1 battery [1] 5/20 be [30] 5/25 6/12 6/25 7/12 8/10 9/6 9/14 13/10 13/12 16/15 16/20 17/6 19/6 19/8 20/16 22/12 23/10 25/9 26/3 26/12 26/13 28/15 29/20 32/3 32/11 33/1 33/12 33/14 35/9 38/5 beat [1] 30/13 because [23] 6/4 7/1 8/4 8/8 11/21 19/21 20/22 22/7 23/9 24/2 24/13 24/17 25/7 26/1 26/8 26/13 26/18 27/21 32/25 33/5 38/4 38/5 38/6 becomes [1] 31/10 bed [1] 30/9 been [14] 8/25 11/17 13/4 14/22 16/6 18/24 19/5 24/4 28/14 30/12 31/15 32/13 33/2 38/3 before [3] 1/20 18/20 39/6 BEFORE-ENTITLED [1] 39/6 behalf [1] 3/20 behind [1] 4/25 being [5] 2/2 12/25 16/25 17/2 23/2 believe [8] 8/12 10/1 11/8 11/15 11/20 18/22 36/7 36/11 believed [3] 9/6 23/23 24/1 believes [1] 11/3 BEST [1] 39/11 better [1] 22/19 between [1] 24/25 bias [2] 20/5 28/7 blanket [1] 25/2 both [2] 5/1 24/22 break [1] 3/12 brief [5] 4/7 4/8 4/19 7/24 18/19 briefing [1] 6/19 briefly [1] 25/6 bring [1] 32/23 bringing [1] 20/20</p>	<p>brings [1] 5/2 Brought [1] 32/16 Brown [1] 20/11 bungled [2] 21/5 27/10 busy [2] 30/7 38/4 but [26] 3/10 8/1 8/8 10/18 12/20 14/8 17/7 17/23 18/15 18/18 21/6 21/11 24/1 24/20 26/7 27/3 27/13 28/15 28/24 30/7 32/3 34/22 35/10 36/19 37/3 38/9</p> <p>C</p> <p>cafeteria [1] 20/19 calendar [2] 3/8 3/8 call [2] 25/22 30/3 called [9] 20/4 23/13 23/17 23/17 23/19 23/21 26/17 30/20 31/3 came [2] 14/15 29/21 can [15] 3/9 13/10 15/18 19/12 19/20 20/16 22/12 24/1 29/9 29/10 30/5 30/8 31/16 33/6 34/25 can't [5] 24/19 26/7 28/11 28/20 32/3 cancel [1] 37/23 cannot [1] 32/1 CAP [1] 12/19 capricious [3] 9/3 11/9 11/21 case [28] 1/1 5/24 6/9 7/21 8/18 8/19 9/8 9/8 9/8 11/2 11/13 13/21 19/10 20/1 20/2 22/9 22/10 22/16 24/9 25/4 25/10 25/11 26/17 28/24 29/6 36/3 36/4 37/9 cases [4] 9/7 9/9 9/11 36/3 cause [7] 8/7 8/24 8/25 9/1 9/2 35/20 35/23 CCR [2] 1/25 39/18 central [2] 37/15 37/15 certainly [1] 33/9</p>	<p>CERTIFICATE [1] 39/1 CERTIFIED [1] 39/4 CERTIFY [1] 39/5 chambers [1] 24/12 Chapter [1] 8/21 Chapter 284 [1] 8/21 charged [3] 5/21 7/7 25/22 charges [9] 5/12 7/10 7/12 7/25 8/2 8/3 13/6 32/20 32/24 chart [1] 21/13 checking [1] 16/20 choke [1] 36/7 chokehold [4] 27/6 27/9 27/12 36/8 Chokeholds [1] 27/7 circumstances [2] 22/8 25/3 cited [1] 37/3 civil [2] 17/4 33/20 claim [1] 30/2 claiming [1] 32/15 clarification [1] 19/16 CLARK [3] 1/7 39/3 39/14 classic [1] 21/10 clean [1] 28/5 clear [9] 6/7 6/13 6/21 7/1 7/4 8/9 31/11 35/13 37/1 clearly [3] 8/13 11/9 31/16 client [15] 20/20 21/6 21/7 21/9 21/15 21/24 22/3 22/7 23/16 23/19 24/15 25/21 27/1 27/8 37/17 client's [1] 23/21 closes [1] 16/16 CO [1] 14/15 CO1 [1] 21/7 CO2 [1] 21/8 Code [3] 5/14 7/5 8/2 collar [1] 27/11 college [1] 22/21 comfort [1] 24/11 command [1]</p>	<p>12/12 commit [1] 26/24 compatible [2] 26/15 26/18 complaints [1] 28/6 complete [3] 15/2 15/6 17/24 completed [1] 12/19 completely [5] 13/24 14/17 18/12 18/13 37/8 compliant [1] 32/12 complied [1] 37/14 comply [1] 17/4 complying [3] 12/20 13/2 13/15 comprehensive [1] 24/24 conceded [1] 26/2 concluded [1] 38/19 conclusion [1] 29/19 conclusions [1] 8/16 conditions [3] 5/15 9/22 17/2 conduct [3] 5/19 25/21 35/14 considered [1] 20/17 constitute [1] 7/14 CONSTITUTES [1] 39/10 continuously [1] 34/24 contraband [5] 16/13 16/20 20/22 28/2 32/17 contradictory [1] 14/17 contradicts [1] 14/8 contrary [1] 21/8 control [1] 34/22 convicted [1] 20/12 cop [1] 21/5 copy [2] 4/6 11/15 Corp [1] 9/2 correct [2] 8/20 23/25 correction [6] 20/25 21/14 22/20 23/13 23/19 24/25</p>
---	---	--	---	---

<p>C</p> <p>correctional [3] 4/16 12/5 12/11</p> <p>CORRECTIONS [2] 1/9 3/21</p> <p>Cotter [1] 24/9</p> <p>could [23] 10/15 10/15 13/3 13/4 13/15 18/4 18/23 20/8 22/4 22/5 23/15 27/20 30/7 32/13 32/13 32/15 32/17 34/9 34/18 34/19 34/19 35/2 38/5</p> <p>couldn't [2] 6/20 34/8</p> <p>counsel [3] 16/4 20/7 38/1</p> <p>counseled [1] 13/12</p> <p>COUNTY [3] 1/7 39/3 39/14</p> <p>course [1] 5/18</p> <p>court [18] 1/6 1/21 6/3 6/9 6/10 8/4 11/17 18/17 18/20 19/21 23/6 24/8 24/16 25/10 25/12 26/9 26/17 28/22</p> <p>cracking [1] 16/12</p> <p>credible [2] 12/1 27/19</p> <p>criminal [9] 10/8 10/9 16/5 16/24 20/1 22/15 29/4 30/22 37/8</p> <p>cross [4] 18/24 27/2 27/13 27/17</p> <p>cross-examine [1] 27/17</p> <p>cuff [9] 21/14 21/18 22/3 27/10 27/24 33/23 33/24 33/25 34/2</p> <p>cuffing [1] 27/21</p> <p>culinary [3] 14/15 16/15 16/19</p>	<p>days [1] 38/7</p> <p>de [3] 10/15 26/22 34/20</p> <p>de novo [1] 26/22</p> <p>de-escalated [2] 10/15 34/20</p> <p>dead [1] 30/13</p> <p>deal [2] 29/1 31/24</p> <p>deception [1] 17/22</p> <p>decided [1] 34/23</p> <p>decision [32] 4/13 6/4 6/10 6/15 6/23 7/20 8/10 8/15 11/9 11/20 11/25 12/2 13/23 18/12 18/13 18/18 18/25 19/6 19/7 23/15 24/18 24/23 25/5 29/21 30/8 30/14 35/4 35/13 36/13 36/16 37/22 38/10</p> <p>decisions [2] 24/10 35/18</p> <p>declined [1] 22/12</p> <p>DEFENDANT [1] 2/15</p> <p>defense [1] 24/3</p> <p>deferred [1] 23/10</p> <p>defined [2] 8/25 9/1</p> <p>Definitely [1] 27/12</p> <p>DEPARTMENT [3] 1/9 2/2 3/20</p> <p>depends [1] 25/3</p> <p>depicted [3] 10/4 12/14 31/23</p> <p>DEPT [1] 1/3</p> <p>deputy [1] 25/7</p> <p>description [1] 4/19</p> <p>desk [1] 13/5</p> <p>detail [2] 14/22 17/24</p> <p>details [3] 14/21 19/19 19/24</p> <p>determination [1] 35/11</p> <p>determine [6] 7/9 8/6 8/23 9/19 15/15 29/15</p> <p>determined [2] 5/25 9/14</p> <p>Di [1] 3/20</p> <p>did [50]</p> <p>didn't [17] 5/8 7/19 10/18 13/1</p>	<p>13/13 14/7 15/6 17/11 18/25 20/9 22/15 27/22 28/25 29/2 29/10 31/19 33/17</p> <p>different [6] 8/15 12/8 12/11 23/9 24/21 36/10</p> <p>DIRECTION [1] 39/9</p> <p>discharge [1] 9/2</p> <p>disciplinary [3] 8/21 35/18 36/4</p> <p>discipline [8] 6/12 8/4 18/22 19/2 25/11 28/5 32/22 36/24</p> <p>discrete [1] 13/13</p> <p>discussed [1] 19/4</p> <p>dishonest [5] 5/10 9/23 10/24 14/6 29/17</p> <p>dishonesty [4] 5/16 17/14 25/25 36/20</p> <p>dismissal [6] 4/14 8/7 8/23 10/2 35/22 37/23</p> <p>dismissed [1] 4/15</p> <p>dispute [1] 7/25</p> <p>distinguished [1] 24/25</p> <p>district [4] 1/6 1/21 23/6 26/9</p> <p>division [1] 11/16</p> <p>do [20] 3/23 6/21 8/9 22/5 23/20 24/24 25/1 25/14 25/15 26/20 29/2 29/10 31/4 32/4 33/15 34/8 35/18 37/18 38/1 39/4</p> <p>DOCKET [1] 1/2</p> <p>documentary [1] 11/2</p> <p>documents [2] 7/11 10/10</p> <p>does [2] 18/14 34/6</p> <p>doesn't [7] 7/25 11/25 12/21 12/23 33/6 33/9 38/8</p> <p>doing [5] 16/21 20/22 29/2 33/2 37/17</p> <p>don't [8] 23/8 29/14 30/11 30/12 31/15 32/24 37/16</p>	<p>37/18</p> <p>done [3] 33/1 35/3 37/14</p> <p>door [1] 16/16</p> <p>down [14] 10/16 13/5 13/19 16/12 17/7 20/16 29/21 31/21 32/2 32/23 33/8 34/21 36/9 39/5</p> <p>drugs [1] 20/23</p> <p>due [1] 35/8</p> <p>during [5] 5/7 16/10 16/18 16/20 22/15</p> <p>duties [2] 5/18 32/25</p> <p>duty [2] 15/10 16/22</p> <p>E</p> <p>each [2] 6/6 22/8</p> <p>early [1] 10/17</p> <p>EAST [1] 2/9</p> <p>easy [1] 30/14</p> <p>effect [1] 6/12</p> <p>effort [1] 24/24</p> <p>eight [1] 16/15</p> <p>either [2] 19/7 37/23</p> <p>employ [1] 12/18</p> <p>employee [7] 7/22 9/16 12/17 15/16 15/22 18/19 25/11</p> <p>employee's [2] 5/15 7/14</p> <p>employees [1] 25/12</p> <p>employer [2] 9/6 25/13</p> <p>employment [6] 4/15 5/16 9/22 17/3 25/15 35/22</p> <p>encourage [1] 33/9</p> <p>end [1] 14/2</p> <p>enforcement [2] 24/18 25/2</p> <p>engaged [9] 7/3 9/17 9/24 10/21 12/13 15/4 15/22 18/16 37/10</p> <p>enjoy [1] 38/11</p> <p>ensued [1] 21/15</p> <p>entire [4] 5/7 11/16 13/20 15/3</p> <p>entirety [2] 8/11 19/7</p> <p>entitled [3] 26/21</p>	<p>30/10 39/6</p> <p>Eric [1] 20/11</p> <p>erred [2] 8/13 11/4</p> <p>erroneous [1] 11/10</p> <p>error [11] 6/7 6/13 6/21 7/1 7/4 8/9 15/2 15/6 15/21 36/13 37/1</p> <p>escalate [2] 10/20 34/24</p> <p>escalated [3] 10/15 34/20 35/7</p> <p>escort [1] 16/22</p> <p>ESQ [2] 2/8 2/18</p> <p>essentially [6] 21/1 25/22 27/13 28/11 28/16 28/25</p> <p>even [6] 17/10 21/16 23/7 30/21 32/6 33/24</p> <p>every [1] 24/14</p> <p>everyone [3] 3/9 28/18 38/11</p> <p>evidence [68]</p> <p>examine [1] 27/17</p> <p>examined [2] 27/2 27/13</p> <p>excessive [12] 10/14 10/21 17/8 17/25 25/23 25/24 26/24 27/20 28/19 29/7 29/17 32/10</p> <p>excuse [1] 30/4</p> <p>expedited [1] 30/8</p> <p>experience [1] 21/11</p> <p>experienced [1] 24/3</p> <p>explain [1] 12/1</p> <p>extension [2] 18/21 19/2</p> <p>extensive [1] 27/16</p> <p>extensively [1] 27/2</p> <p>extra [1] 32/18</p> <p>F</p> <p>fact [6] 7/22 8/3 13/8 16/7 19/1 32/17</p> <p>facts [8] 7/21 9/4 9/14 11/24 15/15 17/24 23/9 35/24</p> <p>factual [4] 6/16 11/13 26/6 26/7</p> <p>fail [2] 13/24 18/15</p> <p>failed [1] 8/9</p>
---	--	--	--	---

F	39/10	guessed [1] 24/12	help [1] 27/24	improper [3] 12/14
fails [1] 18/13	forth [2] 7/10	gun [1] 20/25	here [16] 4/12	12/15 24/10
fair [1] 22/13	31/23	guys [1] 22/24	6/15 7/11 7/16 10/1	improperly [1]
false [7] 5/22	found [10] 6/17	H	13/13 21/25 24/2	18/23
10/24 17/18 17/23	6/22 12/17 14/6	had [32] 3/12 3/25	27/14 27/25 30/19	in [115]
33/9 33/16 36/16	14/24 22/1 27/19	11/14 12/5 12/6	31/25 32/7 37/11	incident [8] 4/16
falsely [1] 29/3	32/17 32/19 33/25	12/10 14/9 14/19	37/12 37/13	5/8 5/9 9/16 10/4
familiar [1] 4/20	four [2] 19/3 30/24	16/3 16/3 16/3 16/6	here's [1] 11/12	15/1 15/8 22/18
far [1] 34/8	Fourth [1] 11/8	18/21 20/12 20/13	HEREBY [1] 39/5	included [7] 10/8
fashion [1] 13/13	friend [2] 21/8	21/11 22/14 23/14	HEREUNTO [1]	10/10 10/11 10/24
favor [2] 28/9 30/1	25/7	23/16 23/18 23/18	39/13	23/14 30/23 31/1
feel [1] 6/7	front [2] 20/2 29/4	28/5 28/13 28/18	hidden [1] 27/14	including [3] 5/19
feels [1] 19/4	FULL [1] 39/10	29/23 30/1 31/20	hide [1] 27/15	9/25 33/1
felon [1] 20/12	function [1] 16/22	33/11 36/16 38/6	high [1] 20/21	incompatible [1]
felony [1] 20/14	further [3] 7/13	39/6 39/12	higher [3] 11/6	5/15
few [2] 8/15 30/18	16/23 31/6	hand [2] 4/9 28/3	13/21 34/16	inconvenience [1]
fidgedet [1] 31/18	G	hands [8] 5/1	him [48]	3/10
fidgety [2] 12/25	Gardner [1] 20/11	14/10 14/11 17/11	his [45]	incorrectly [1]
32/12	Gas [3] 9/1 25/13	21/1 31/19 31/20	hit [1] 21/22	14/24
figure [1] 28/19	35/21	32/10	hold [1] 30/5	indicated [2] 3/25
filed [1] 22/10	general [3] 2/7	happen [4] 20/9	holding [1] 6/11	39/7
filled [2] 15/17	21/9 25/8	25/21 26/10 26/10	Honor [14] 3/13	indiscernible [8]
36/13	generals [1] 27/3	happened [5]	3/16 4/11 11/14	7/20 19/5 19/18
finally [2] 30/8	Gentile [8] 20/3	19/25 20/9 23/23	11/18 19/12 19/14	23/1 24/13 28/17
35/1	20/7 23/6 24/2 27/4	26/15 28/1	22/17 23/7 29/13	28/21 29/10
find [2] 15/5 28/2	27/18 28/16 30/15	happening [3]	30/18 37/17 37/22	individual [1] 25/1
finding [1] 6/16	gestures [1] 28/3	16/20 37/16 37/19	38/13	individual's [1]
findings [6] 7/4	get [13] 6/19	harassing [1] 34/5	HONORABLE [1]	32/6
7/18 8/7 8/16 12/22	11/12 13/6 16/3	harassment [2]	1/20	infirmary [1]
15/24	19/19 19/24 24/19	9/25 20/17	hope [2] 11/14	21/20
fine [2] 3/13 14/3	29/22 30/8 30/9	harder [2] 25/8	11/17	information [1]
fire [1] 28/11	30/9 30/17 38/10	35/9	horse [1] 30/13	31/4
first [5] 6/7 17/2	gets [1] 28/10	has [24] 4/19 8/7	hours [1] 14/14	inmate [47]
19/15 19/24 22/15	give [2] 32/19 38/9	8/25 11/24 15/16	how [1] 24/5	inmate's [1] 14/11
five [2] 5/11 12/3	glitch [1] 13/25	20/14 20/25 20/25	Howell [2] 12/9	inmates [18]
floor [1] 4/9	go [4] 3/14 4/8 6/6	23/4 24/8 24/18	12/24	10/11 13/12 16/5
flow [1] 15/14	29/9	25/9 25/10 25/14	However [2] 5/23	16/6 16/9 16/13
flows [1] 15/17	goes [1] 24/16	25/14 26/17 28/13	35/14	16/18 17/7 17/8
Floyd [1] 20/11	going [4] 13/18	28/22 29/25 30/5	hurt [4] 21/3 22/18	20/4 30/20 30/24
focus [1] 5/25	22/20 38/1 38/1	34/15 34/16 35/10	22/25 27/23	30/24 30/25 31/2
follow [2] 33/19	gone [2] 20/13	37/14	I	31/13 31/16 33/1
33/20	30/5	have [64]	I'll [1] 6/6	inmates' [1] 16/23
followed [2] 9/7	good [4] 3/6 3/19	haven't [1] 38/6	I'm [12] 3/10 4/20	innocent [1] 29/3
37/20	3/22 9/2	having [1] 32/18	14/1 24/2 32/1 32/2	inquiry [2] 25/20
following [1] 5/9	got [3] 21/1 22/16	he [124]	33/3 35/8 38/1 38/1	26/19
food [2] 20/19	26/1	he's [11] 21/1	38/2 38/5	instance [1] 31/9
32/18	governing [1] 36/2	22/18 22/18 22/19	I've [1] 4/6	instead [3] 10/16
force [26] 5/23	governs [1] 35/17	22/21 24/4 25/1	if [23] 8/23 11/25	13/18 34/22
10/22 12/18 14/17	Graham [1] 24/9	26/21 29/2 30/10	13/2 13/7 13/14	intentionally [1]
14/21 14/25 15/7	grammar [1] 15/14	31/17	16/19 23/5 23/8	14/7
17/25 18/4 18/11	grammatically [1]	head [2] 21/23	23/10 24/22 26/2	interest [1] 26/23
21/2 21/3 21/16	23/25	32/10	26/13 28/12 28/21	intervene [1] 5/9
21/18 21/22 21/24	green [1] 26/5	heard [4] 2/2	30/7 30/11 32/6	intervened [5]
22/1 25/24 25/24	ground [5] 5/2	21/21 23/12 27/25	32/12 32/12 32/18	10/15 18/7 18/8
26/24 27/11 27/20	21/17 21/23 22/24	hearing [89]	34/15 36/23 36/25	34/18 34/19
28/19 29/7 29/17	27/25	hearings [2] 9/9	illegal [1] 9/4	interviews [1]
34/9	guess [5] 4/5 4/8	9/13	importantly [1]	10/11
FOREGOING [1]	15/11 24/11 38/6	held [2] 7/13 13/21	34/20	intimidating [1]

<p>I</p> <p>intimidating... [1] 9/25</p> <p>intimidation [1] 5/19</p> <p>into [12] 4/24 5/1 6/6 11/12 19/19 19/24 22/8 24/19 30/23 31/5 35/1 39/8</p> <p>invalid [3] 5/25 6/11 28/22</p> <p>invalidated [1] 8/4</p> <p>investigation [8] 10/7 10/8 10/9 16/5 16/24 30/22 31/1 31/5</p> <p>investigations [1] 16/4</p> <p>investigative [1] 15/18</p> <p>investigator [4] 12/6 18/8 31/6 36/10</p> <p>involved [1] 20/1</p> <p>involving [1] 10/4</p> <p>irrelevant [1] 37/8</p> <p>is [91]</p> <p>isn't [10] 18/17 19/23 20/1 20/10 20/11 21/3 23/1 29/8 31/23 34/16</p> <p>ISOM [4] 1/25 39/4 39/18 39/18</p> <p>issue [9] 9/18 18/17 18/19 27/6 28/10 28/11 32/24 36/24 37/20</p> <p>issued [1] 6/10</p> <p>issues [1] 11/13</p> <p>it [67]</p> <p>it's [16] 11/21 20/21 24/10 24/19 26/5 26/14 26/20 29/13 29/22 30/12 30/22 33/13 34/13 36/23 38/4 38/4</p> <p>its [3] 6/10 8/11 35/9</p>	<p>JOSE [2] 1/12 3/16</p> <p>judge [4] 1/20 1/21 4/4 23/7</p> <p>judges [3] 24/11 24/17 26/10</p> <p>judicial [4] 1/16 4/12 18/24 37/13</p> <p>JUNE [3] 1/23 3/1 3/7</p> <p>June 9 [1] 3/7</p> <p>jury [2] 24/4 29/4</p> <p>just [29] 3/9 4/2 8/7 8/24 8/25 9/2 11/21 12/2 12/21 13/16 13/18 13/23 15/7 15/16 18/12 20/6 23/25 25/2 30/4 30/5 30/18 30/21 33/5 33/18 33/20 33/23 35/19 35/23 37/16</p> <p>justice [1] 25/2</p> <p>K</p> <p>keep [6] 13/2 21/2 21/22 32/24 33/7 34/23</p> <p>keeping [2] 17/8 34/4</p> <p>kept [5] 4/23 10/13 21/21 31/15 32/9</p> <p>kick [1] 21/23</p> <p>kid's [1] 22/21</p> <p>killed [2] 21/4 23/2</p> <p>kind [1] 14/2</p> <p>knew [1] 15/9</p> <p>know [24] 11/13 12/4 12/20 12/25 15/22 17/7 24/3 27/5 30/7 30/11 30/12 30/22 31/18 31/24 33/11 33/23 34/8 35/8 36/6 36/7 37/12 37/16 37/17 37/18</p> <p>knowingly [1] 14/7</p> <p>knows [2] 24/5 25/12</p>	<p>31/11</p> <p>Lastly [1] 18/3</p> <p>laughing [4] 22/17 22/19 22/21 27/25</p> <p>law [10] 2/17 6/13 19/9 23/4 23/5 24/17 25/2 26/10 26/17 36/3</p> <p>laws [1] 33/5</p> <p>lawyers [1] 24/17</p> <p>leading [2] 17/24 25/11</p> <p>least [1] 36/10</p> <p>leave [1] 16/19</p> <p>legal [3] 6/12 9/1 25/6</p> <p>length [1] 32/9</p> <p>less [1] 26/14</p> <p>lesser [2] 26/4 26/11</p> <p>let's [3] 3/14 19/14 19/22</p> <p>letting [1] 25/24</p> <p>level [2] 12/11 17/17</p> <p>levels [1] 12/11</p> <p>license [1] 36/5</p> <p>licensed [1] 8/19</p> <p>lie [1] 29/17</p> <p>lien [2] 30/1 37/11</p> <p>lieutenant [3] 23/14 23/22 29/18</p> <p>light [2] 26/5 26/5</p> <p>like [7] 20/10 20/21 21/3 23/1 27/11 33/1 38/8</p> <p>likely [1] 26/21</p> <p>line [2] 12/4 16/14</p> <p>listed [2] 7/15 7/16</p> <p>listing [1] 7/21</p> <p>long [2] 24/4 30/12</p> <p>look [6] 19/22 26/3 31/10 37/6 38/2 38/8</p> <p>looking [3] 19/15 21/21 21/22</p> <p>lot [2] 24/24 25/8</p> <p>Lucero [1] 26/18</p> <p>Ludwick [6] 6/11 7/13 9/8 28/11 36/24 36/25</p> <p>lunch [1] 32/18</p> <p>M</p> <p>ma'am [7] 4/2 4/10 11/19 14/3 19/11 30/17 37/25</p> <p>macro [4] 19/15 19/22 19/23 23/3</p>	<p>made [7] 6/16 12/22 17/18 22/12 27/5 30/15 33/16</p> <p>maimed [1] 21/3</p> <p>major [1] 25/23</p> <p>make [12] 4/3 7/18 8/7 15/16 15/23 23/15 24/9 24/18 35/9 35/11 36/16 37/5</p> <p>makes [1] 15/17</p> <p>making [6] 7/4 8/16 25/8 25/19 28/3 37/7</p> <p>MALANIS [1] 2/13</p> <p>man [1] 29/3</p> <p>Mark [2] 20/3 20/7</p> <p>MARKS [10] 2/17 2/18 3/16 19/20 30/16 30/20 31/22 33/22 36/23 37/20</p> <p>matter [6] 3/8 3/23 6/25 35/22 36/5 39/7</p> <p>matters [3] 2/2 8/21 35/18</p> <p>may [1] 19/13</p> <p>maybe [5] 27/10 31/18 38/4 38/4 38/9</p> <p>me [1] 27/8</p> <p>mean [1] 33/6</p> <p>meaning [2] 23/7 28/12</p> <p>means [1] 26/14</p> <p>medical [1] 22/22</p> <p>mentioned [3] 6/8 7/6 17/13</p> <p>mentions [1] 35/16</p> <p>merit [1] 18/23</p> <p>merits [2] 28/24 37/13</p> <p>Michael [1] 20/11</p> <p>MICHELLE [2] 2/8 3/19</p> <p>mind [1] 22/12</p> <p>minded [1] 22/13</p> <p>minor [2] 12/7 20/19</p> <p>minute [5] 4/23 12/19 16/18 19/19 34/3</p> <p>minutes [11] 4/24 5/7 14/23 15/3 16/16 21/25 22/1 31/18 32/25 35/5 35/7</p>	<p>misconduct [5] 9/17 12/13 15/23 18/16 37/10</p> <p>misleading [3] 5/22 10/25 17/19</p> <p>misrepresentation [1] 14/18</p> <p>missed [1] 19/21</p> <p>Monday [1] 24/19</p> <p>money [3] 30/5 30/9 30/9</p> <p>months [2] 30/6 38/9</p> <p>Moore [5] 12/6 12/23 18/8 31/6 36/11</p> <p>more [7] 11/12 14/22 19/19 21/11 26/21 34/20 38/4</p> <p>morning [2] 3/11 24/19</p> <p>motion [3] 22/11 24/7 24/19</p> <p>moved [1] 31/20</p> <p>Mr. [31] 4/14 4/17 4/21 5/6 5/11 7/24 10/14 12/6 12/20 13/20 14/6 14/13 14/25 15/2 16/12 16/21 16/25 17/3 18/1 18/16 19/2 19/20 30/16 30/20 30/24 31/22 33/22 34/23 36/23 37/10 37/20</p> <p>Mr. Marks [7] 19/20 30/16 30/20 31/22 33/22 36/23 37/20</p> <p>Mr. Navarette [2] 34/23 37/10</p> <p>Mr. Navarette's [2] 14/13 14/25</p> <p>Mr. Navarrete [17] 4/14 4/17 4/21 5/6 5/11 7/24 10/14 12/20 13/20 14/6 15/2 16/12 16/21 17/3 18/1 18/16 19/2</p> <p>Mr. Norelus [2] 16/25 30/24</p> <p>Mr. Rod [1] 12/6</p> <p>much [2] 5/25 25/18</p> <p>must [2] 6/25 7/14</p> <p>my [25] 6/2 14/2 19/21 20/20 21/6</p>
<p>J</p> <p>Jackson [1] 30/25</p> <p>jazz [1] 37/11</p> <p>Jerry [1] 12/9</p> <p>job [5] 15/15 17/10 18/9 26/23 31/25</p> <p>joking [2] 22/21 27/25</p>	<p>L</p> <p>lack [1] 17/24</p> <p>lacked [1] 14/21</p> <p>language [3] 6/17 36/22 37/3</p> <p>LAS [3] 2/11 2/20 2/25</p> <p>last [6] 16/3 16/14 18/17 29/9 30/17</p>			

<p>M</p> <p>my... [20] 21/7 21/8 21/9 21/15 21/24 22/3 22/7 22/20 23/4 23/16 24/15 25/7 25/18 25/21 31/25 37/17 39/9 39/11 39/14 39/14</p> <p>N</p> <p>NAC [11] 7/15 7/17 7/23 8/8 9/20 17/2 17/15 25/22 28/20 36/18 37/5 NAC 284.650 [1] 9/20 NAC was [1] 25/22 NAME [1] 39/14 Navarette [10] 7/7 24/13 27/15 27/23 28/5 29/12 29/16 29/23 34/23 37/10 Navarette's [2] 14/13 14/25 NAVARRETE [22] 1/12 3/17 4/14 4/17 4/21 5/6 5/11 7/24 10/14 12/20 13/20 14/6 15/2 16/12 16/21 17/3 18/1 18/16 19/2 27/8 32/1 33/15 NDOC [8] 6/5 6/10 11/3 12/3 18/21 19/1 19/4 37/14 NDOC's [2] 5/7 6/24 necessary [1] 21/18 neck [2] 5/2 36/8 need [5] 13/2 15/23 31/15 33/1 36/14 needed [2] 6/1 23/8 needs [2] 12/1 26/11 NEVADA [11] 1/7 1/9 3/1 5/13 6/10 7/5 8/2 25/10 25/12 39/2 39/15 never [10] 7/23 21/11 23/17 23/17 25/2 26/1 27/23 29/25 35/12 35/16 news [3] 20/10 31/23 33/4</p>	<p>next [1] 31/20 night [1] 15/11 NINTH [1] 2/19 Nisteri [3] 8/18 8/19 36/4 no [31] 1/1 5/3 6/11 13/2 13/16 14/3 14/9 14/14 16/13 20/4 20/4 20/25 20/25 21/24 21/24 22/5 22/12 23/1 27/15 28/5 28/6 28/6 30/4 30/20 31/12 32/11 33/7 33/8 33/8 34/1 34/1 no-discipline [1] 28/5 nobody [2] 22/25 24/1 noncompliant [1] 13/8 None [1] 9/11 nonstarter [1] 28/23 Norelus [12] 4/18 4/21 14/11 14/14 16/6 16/25 30/24 31/8 31/12 31/14 34/21 34/23 Norelus's [1] 5/2 not [73] noted [1] 30/20 NOTES [1] 39/8 nothing [6] 21/15 23/23 25/14 25/14 27/14 27/15 notice [3] 13/6 32/19 32/24 novo [1] 26/22 now [5] 25/6 29/22 30/5 38/3 38/5 nowhere [3] 28/10 34/5 36/2 NRS [4] 7/8 8/22 9/10 18/3 NRS 284.390 [2] 8/22 9/10 NRS 284.650 [1] 18/3 NRS 284.794 [1] 7/8 number [3] 23/13 23/19 36/19 numerous [4] 13/9 24/6 24/6 27/4 NV [3] 1/25 2/11 2/20</p>	<p>O</p> <p>o'clock [2] 3/11 3/11 O'Keefe [14] 9/8 25/10 25/16 26/1 26/3 26/8 26/12 26/15 26/19 28/8 28/18 35/10 35/16 35/25 observing [1] 35/6 obviously [2] 20/15 23/16 occur [4] 5/8 10/21 13/13 17/12 occurred [7] 4/19 9/16 14/19 15/7 34/6 35/6 35/15 occurrence [1] 34/3 occurring [1] 33/18 October [1] 4/20 October 9 [1] 4/20 off [5] 14/15 15/5 21/18 28/3 34/25 office [5] 2/7 2/17 2/23 27/3 39/14 officer [82] Officer Navarette [2] 32/1 33/15 officer's [11] 4/13 6/4 11/8 15/20 18/13 18/18 19/6 24/23 29/19 35/13 37/22 officers [18] 10/5 10/6 12/13 13/9 16/8 20/24 21/7 23/3 23/13 23/20 24/9 25/1 32/7 33/4 33/9 33/13 34/4 34/14 often [1] 24/17 okay [11] 3/18 4/2 4/4 4/5 14/4 14/4 15/11 19/11 19/14 30/16 38/14 omission [1] 17/22 omissions [3] 10/25 17/25 33/16 on [84] once [3] 3/22 31/11 31/12 one [20] 3/8 6/6 9/3 9/4 16/8 21/7 22/25 25/17 25/20 25/23 26/19 28/8 29/1 31/14 31/17</p>	<p>34/16 34/21 35/12 35/14 38/8 one-shot [1] 29/1 only [13] 3/8 8/3 15/13 17/23 18/14 25/17 27/2 27/23 31/14 31/17 36/18 36/23 37/12 open [1] 22/13 opening [1] 4/7 operating [3] 13/11 17/5 17/9 operational [2] 33/19 34/12 opinion [1] 23/9 opponent [2] 23/4 25/19 opportunity [1] 11/15 opposing [1] 7/24 or [56] order [2] 2/2 8/6 ordered [1] 29/23 orders [2] 13/11 17/5 organization [1] 21/12 other [23] 5/21 10/11 13/3 16/13 16/23 20/23 21/6 21/12 21/14 22/14 23/19 25/25 26/16 28/7 30/11 30/25 31/12 31/15 32/13 32/25 33/1 34/14 37/19 our [10] 3/14 23/19 23/21 26/10 27/1 27/8 29/6 29/8 30/1 30/9 out [18] 5/3 5/17 10/13 15/17 16/1 16/7 16/9 16/14 16/25 17/6 20/20 26/17 28/19 29/21 30/21 31/8 31/8 38/10 over [4] 19/20 29/22 30/6 35/7 own [3] 21/12 23/15 29/18</p> <p>P</p> <p>p.m [2] 3/2 3/12 paid [1] 29/25 pandemic [1] 30/4 part [9] 15/18 18/8 25/16 25/17 25/17 25/20 26/19 31/25</p>	<p>37/14 particular [1] 16/24 past [1] 16/4 pat [1] 32/2 patted [4] 10/16 20/16 31/21 34/21 patting [1] 17/7 pay [2] 22/20 29/25 payroll [3] 30/3 37/15 37/15 PEGGY [4] 1/25 39/4 39/18 39/18 penalties [1] 26/4 people [4] 17/16 21/3 23/2 36/10 pepper [1] 21/1 perceived [1] 15/5 percent [1] 26/14 perception [1] 14/25 performance [1] 5/18 period [1] 16/18 permit [1] 12/18 Perry [1] 12/9 PERS [1] 30/10 person [1] 32/6 personnel [1] 26/22 petition [4] 1/16 4/12 18/24 37/13 petitioner [3] 1/10 2/5 4/9 petitioner's [1] 4/7 phonetic [1] 8/18 physical [1] 13/8 picking [1] 16/7 picture [2] 19/23 23/3 place [5] 3/14 25/24 27/15 33/21 39/7 placed [2] 32/3 32/8 places [1] 5/1 plaintiff [1] 3/17 play [1] 36/2 point [5] 6/3 29/21 30/21 33/24 35/1 points [2] 25/7 30/19 police [1] 23/2 policies [1] 32/5 pose [1] 13/1 position [3] 5/8</p>
---	---	---	---	--

<p>P</p> <p>position... [2] 6/24 17/6</p> <p>POST [2] 13/11 17/5</p> <p>pre [1] 30/4</p> <p>pre-pandemic [1] 30/4</p> <p>preponderance [9] 8/14 8/17 9/12 11/4 26/11 26/12 35/16 35/19 36/1</p> <p>present [2] 5/6 15/3</p> <p>presented [1] 12/3</p> <p>prevail [1] 29/11</p> <p>prevailed [2] 29/5 29/7</p> <p>prevented [2] 18/4 18/10</p> <p>previously [4] 3/25 19/3 29/23 30/1</p> <p>prison [9] 13/12 16/9 20/14 20/17 20/23 31/24 32/22 33/6 34/12</p> <p>prisoner [1] 20/14</p> <p>private [1] 25/13</p> <p>probably [4] 24/14 30/6 36/10 38/6</p> <p>probative [1] 11/10</p> <p>problem [2] 20/18 20/21</p> <p>problems [1] 30/2</p> <p>procedural [1] 28/25</p> <p>procedures [6] 13/11 17/5 17/10 32/5 33/20 34/13</p> <p>proceed [1] 19/12</p> <p>Proceedings [3] 38/19 39/6 39/12</p> <p>process [1] 15/19</p> <p>processed [1] 28/14</p> <p>profiling [1] 20/5</p> <p>promoted [1] 23/22</p> <p>proper [2] 18/21 32/4</p> <p>properly [4] 28/14 32/14 33/14 33/17</p> <p>property [1] 26/23</p> <p>prove [2] 24/1 29/10</p> <p>provisions [1] 7/3</p>	<p>public [2] 25/12 25/15</p> <p>pulled [2] 9/11 16/14</p> <p>punch [1] 21/23</p> <p>purpose [1] 37/1</p> <p>PURSUANT [1] 2/2</p> <p>pursue [1] 18/22</p> <p>push [1] 33/6</p> <p>pushed [1] 13/18</p> <p>pushes [2] 5/1 35/1</p> <p>put [4] 17/11 27/11 30/8 36/8</p> <p>Q</p> <p>quarterback [1] 24/20</p> <p>questions [2] 27/5 30/12</p> <p>quick [1] 38/10</p> <p>quiet [1] 13/20</p> <p>quotes [1] 6/17</p> <p>R</p> <p>racial [4] 20/5 20/5 20/6 28/7</p> <p>raise [1] 18/19</p> <p>raised [1] 18/23</p> <p>random [1] 32/2</p> <p>randomly [1] 4/22</p> <p>range [1] 12/10</p> <p>ranging [1] 12/4</p> <p>reached [1] 35/12</p> <p>read [3] 4/6 24/22 27/4</p> <p>really [7] 24/4 25/18 26/19 29/13 30/7 30/13 38/2</p> <p>reason [11] 7/2 8/10 8/12 9/4 11/3 18/17 20/20 32/11 33/7 33/8 33/8</p> <p>reasonable [1] 21/17</p> <p>reasonably [1] 9/5</p> <p>reasons [3] 6/6 19/3 37/24</p> <p>receive [1] 11/15</p> <p>recent [1] 9/7</p> <p>record [11] 3/15 11/11 11/17 11/23 18/14 28/5 29/16 30/14 30/22 38/2 39/11</p> <p>recuse [1] 22/11</p> <p>red [1] 26/5</p> <p>redundant [2] 8/1 8/1</p>	<p>references [1] 35/25</p> <p>regarding [2] 7/4 14/22</p> <p>regardless [1] 25/13</p> <p>regular [1] 12/4</p> <p>regulation [1] 33/19</p> <p>regulations [4] 6/1 17/5 34/12 37/4</p> <p>reinstated [1] 4/14</p> <p>reinvent [1] 29/14</p> <p>relative [1] 24/13</p> <p>relatively [2] 30/14 38/10</p> <p>release [2] 10/18 34/22</p> <p>released [1] 31/21</p> <p>releasing [1] 17/7</p> <p>reliable [1] 11/10</p> <p>reliance [2] 15/20 36/21</p> <p>relied [1] 36/23</p> <p>relies [2] 6/15 36/25</p> <p>rely [5] 6/8 6/12 6/20 33/13 37/2</p> <p>relying [1] 8/16</p> <p>remained [1] 14/12</p> <p>remand [3] 6/13 28/15 37/23</p> <p>remanded [2] 6/25 19/8</p> <p>reply [1] 4/8</p> <p>report [19] 5/10 10/9 10/24 12/15 14/8 14/13 14/20 15/1 15/11 15/14 15/15 15/17 17/18 17/23 23/24 29/18 33/14 33/17 36/16</p> <p>reported [5] 1/25 3/24 13/4 15/1 18/1</p> <p>reporter [3] 19/16 19/21 39/4</p> <p>REPORTER'S [2] 1/15 38/22</p> <p>reporting [1] 14/21</p> <p>reports [4] 10/6 22/22 33/10 33/13</p> <p>required [3] 34/14 37/5 37/6</p> <p>requires [1] 8/22</p> <p>resisting [1] 17/21</p> <p>respect [2] 7/19</p>	<p>35/8</p> <p>Respondent [1] 1/13</p> <p>respondent's [1] 4/7</p> <p>responsibility [1] 34/17</p> <p>restrain [5] 5/5 13/15 13/18 14/16 32/15</p> <p>restrained [3] 22/25 32/14 32/16</p> <p>restraints [3] 5/3 14/10 34/1</p> <p>result [1] 4/16</p> <p>resulting [1] 14/16</p> <p>reverse [1] 18/18</p> <p>reversed [1] 4/13</p> <p>review [5] 1/16 4/13 18/24 20/8 37/14</p> <p>reviewed [2] 4/6 15/14</p> <p>revocation [2] 8/19 36/5</p> <p>rewrite [1] 15/15</p> <p>Ricky [1] 4/17</p> <p>right [9] 3/6 3/22 4/5 25/3 26/3 31/19 37/25 38/3 38/5</p> <p>rights [7] 6/5 17/4 19/4 19/5 20/15 32/6 33/20</p> <p>RMR [2] 1/25 39/18</p> <p>Rod [2] 12/6 31/6</p> <p>rude [1] 28/3</p> <p>rule [1] 8/8</p> <p>ruled [5] 22/6 22/7 28/13 28/22 30/1</p> <p>rules [6] 12/15 12/16 17/9 28/8 33/5 33/21</p> <p>ruling [3] 19/9 37/5 37/7</p> <p>Russell [5] 12/9 12/24 17/22 18/10 36/12</p> <p>S</p> <p>sack [1] 32/18</p> <p>said [21] 8/15 13/14 14/13 15/13 16/2 16/8 17/20 18/6 18/8 18/10 19/22 22/12 24/8 24/15 24/16 26/2 28/16 29/1 29/11 33/22 39/8</p>	<p>same [2] 20/14 29/4</p> <p>saw [1] 23/22</p> <p>say [2] 14/1 19/20</p> <p>saying [5] 21/9 26/13 32/1 32/3 33/3</p> <p>says [8] 7/8 14/9 18/7 22/19 28/11 36/23 36/25 36/25</p> <p>school [1] 20/21</p> <p>scuffle [2] 21/15 33/23</p> <p>sealable [1] 20/2</p> <p>search [6] 4/22 12/19 15/23 16/22 32/2 36/15</p> <p>searched [3] 16/15 20/16 31/13</p> <p>searching [4] 15/21 16/21 33/1 36/14</p> <p>second [9] 7/2 8/10 22/2 22/16 24/10 24/11 24/12 24/18 35/4</p> <p>Secondly [1] 31/22</p> <p>seconds [7] 4/24 15/2 15/6 16/15 16/16 16/17 35/6</p> <p>Section [6] 5/14 5/17 7/8 8/22 17/15 18/3</p> <p>Sections [1] 7/17</p> <p>sector [1] 25/15</p> <p>see [4] 20/9 22/4 31/16 34/25</p> <p>seeing [2] 21/3 23/1</p> <p>seems [1] 13/23</p> <p>seen [1] 13/10</p> <p>select [1] 32/2</p> <p>selected [2] 4/22 31/11</p> <p>send [1] 32/22</p> <p>senior [7] 5/6 13/21 18/1 18/4 18/6 18/9 34/13</p> <p>sense [2] 15/17 21/10</p> <p>separate [2] 8/2 22/7</p> <p>sergeant [10] 13/5 13/16 15/12 15/13 21/19 23/21 32/16 32/23 33/18 34/15</p> <p>Sergeant Willett [1] 15/13</p>
--	---	---	---	--

S	something's [1] 26/13 Sometimes [1] 34/15 somewhere [1] 38/9 sorry [3] 3/10 14/1 14/4 soul [4] 15/20 15/23 36/14 36/15 sounds [1] 20/19 SOUTH [1] 2/19 Southwest [3] 9/1 25/13 35/21 specific [3] 6/17 7/6 37/3 specifically [3] 6/15 6/22 36/22 specifications [1] 7/10 specificity [2] 5/12 7/12 split [4] 22/2 24/10 24/18 35/4 split-second [2] 24/10 24/18 spontaneous [3] 14/16 22/2 27/22 spot [1] 31/19 spray [1] 21/2 staff [1] 12/12 stage [1] 29/15 stalking [1] 5/19 stand [3] 27/2 27/17 35/19 standard [7] 8/14 8/20 9/12 11/5 11/6 13/22 26/12 standing [2] 22/4 31/17 start [1] 19/14 state [14] 11/24 13/12 25/12 26/22 28/10 29/24 30/2 30/3 30/4 35/18 35/21 37/19 39/2 39/14 stated [3] 8/17 16/6 37/24 statements [8] 5/22 10/25 10/25 15/9 16/23 17/18 17/23 33/16 statute [1] 35/17 statutes [1] 36/3 statutory [1] 7/3 stay [2] 10/18 24/6 stealing [1] 20/19	STENOTYPE [2] 39/5 39/8 step [3] 35/12 35/12 35/14 step one [2] 35/12 35/14 step two [1] 35/12 steps [3] 13/3 32/13 35/10 still [7] 6/22 13/2 17/11 29/25 31/17 32/4 33/4 stood [2] 14/23 15/3 stop [2] 22/5 34/9 stopped [3] 14/2 20/16 27/21 straight [2] 26/4 26/5 street [4] 2/19 20/15 20/24 21/4 stuff [1] 21/25 subject [1] 27/17 submit [2] 14/7 15/18 submitted [1] 11/16 SUBSCRIBED [1] 39/13 subsection [2] 5/14 5/16 substantial [44] substantially [1] 6/5 suddenly [1] 15/7 suggest [1] 9/11 SUITE [1] 2/10 summarily [1] 12/2 summary [1] 31/1 supervise [2] 21/10 34/14 SUPERVISION [1] 39/9 supervisor [4] 15/10 21/10 21/11 33/17 supervisory [2] 12/6 31/6 supplemental [1] 6/19 support [10] 9/15 9/19 10/2 12/12 12/22 12/23 23/6 34/6 34/13 35/23 supported [17] 5/4 8/23 9/5 10/12 10/23 11/1 11/22	13/23 14/20 15/22 15/25 17/14 32/9 34/10 34/19 35/2 36/18 supports [5] 16/23 17/1 18/16 24/15 37/9 supposed [7] 16/19 17/4 17/6 23/7 23/10 25/1 35/9 Supreme [8] 6/9 6/10 8/4 24/8 24/16 25/10 26/17 28/22 sure [4] 4/3 4/20 15/16 24/2 synonymous [1] 8/25 system [2] 26/22 29/8 T take [5] 13/16 25/24 33/8 38/2 38/9 taken [6] 13/4 13/5 16/14 21/19 29/22 32/13 taking [1] 28/3 talk [1] 25/6 talked [2] 12/2 31/22 talking [1] 21/2 talks [3] 20/7 26/3 35/22 tape [4] 22/16 22/17 24/5 24/7 technicality [1] 29/1 technique [1] 5/5 telephonic [4] 1/18 2/2 13/24 39/6 tell [1] 3/9 telling [2] 6/20 26/9 ten [1] 32/25 terminate [1] 19/8 terms [1] 23/4 test [1] 25/16 testified [7] 12/8 12/12 12/24 16/2 16/12 20/20 23/22 testify [3] 23/20 31/7 31/16 testifying [1] 17/16 testimony [19] 5/4 11/2 12/1 12/10 12/23 13/14 13/17	14/20 15/13 17/21 18/5 32/8 32/19 33/11 34/6 34/10 34/17 34/19 36/9 than [7] 11/6 25/8 25/18 26/11 26/14 26/21 35/9 thank [7] 4/11 19/11 30/16 30/18 37/25 38/12 38/13 Thankfully [1] 29/24 Thanks [1] 4/4 that [182] that the [1] 26/17 that's [19] 3/13 11/17 13/22 18/20 20/17 20/21 20/22 21/12 22/5 23/3 26/15 26/18 26/18 28/22 29/11 32/18 33/23 36/24 37/12 their [7] 13/10 18/19 21/12 24/11 32/21 32/23 37/14 them [3] 32/22 32/23 34/15 then [13] 4/22 5/9 10/17 10/18 10/23 14/8 19/19 19/24 21/18 21/19 22/25 23/12 26/8 theory [1] 29/4 there [47] there's [7] 22/25 23/5 24/6 25/16 27/6 29/15 30/2 THEREAFTER [1] 39/8 these [12] 8/1 8/20 9/9 9/12 10/4 12/13 13/8 21/25 32/7 33/13 34/3 36/3 they [28] 12/24 13/4 15/16 15/17 16/7 16/12 16/19 17/20 20/15 21/2 21/16 22/14 23/16 23/17 23/20 26/2 27/24 29/10 30/2 30/3 31/3 32/13 32/15 32/15 32/17 32/17 33/2 37/18 they're [5] 8/1 8/3 9/15 32/14 32/21 things [4] 20/23 27/5 32/4 33/14
----------	--	--	--	---

<p>T</p> <p>think [8] 12/1 19/21 23/4 23/8 24/15 24/22 25/7 30/13</p> <p>third [2] 8/12 11/3</p> <p>this [85]</p> <p>those [13] 5/13 6/1 6/6 7/16 7/19 9/11 15/24 16/6 18/2 18/9 31/1 32/4 37/3</p> <p>though [2] 17/11 30/21</p> <p>thought [1] 15/11</p> <p>threat [2] 13/1 13/8</p> <p>threatening [1] 5/19</p> <p>three [14] 5/13 7/6 7/16 15/2 15/6 17/1 25/16 26/1 26/3 30/25 35/5 35/10 35/12 36/10</p> <p>three-part [1] 25/16</p> <p>through [1] 29/3</p> <p>throughout [1] 15/8</p> <p>time [18] 3/7 3/12 10/14 12/7 13/20 16/10 16/21 17/9 18/21 20/16 24/4 24/14 24/24 27/23 31/25 32/9 38/4 39/7</p> <p>timely [2] 13/13 19/1</p> <p>times [5] 9/8 13/9 24/6 24/14 24/21</p> <p>TIMOTHY [1] 1/20</p> <p>told [1] 37/2</p> <p>took [6] 13/19 22/8 24/24 36/8 36/9 39/5</p> <p>touch [1] 21/16</p> <p>touched [1] 27/23</p> <p>toward [1] 13/10</p> <p>traded [1] 20/22</p> <p>train [1] 22/19</p> <p>trains [1] 34/14</p> <p>TRANSCRIBED [1] 39/8</p> <p>transcript [3] 1/15 27/4 39/10</p> <p>trial [4] 29/4 37/8 38/5 38/6</p> <p>trials [1] 24/4</p>	<p>tried [5] 20/13 21/14 22/2 28/24 32/15</p> <p>tries [1] 24/3</p> <p>true [5] 9/6 23/24 24/1 26/14 39/10</p> <p>truly [1] 16/19</p> <p>truthful [1] 33/14</p> <p>try [1] 28/25</p> <p>trying [4] 33/22 33/24 34/2 35/9</p> <p>TUESDAY [2] 1/23 3/1</p> <p>tussle [1] 22/24</p> <p>TV [2] 21/25 23/2</p> <p>two [17] 5/21 6/1 10/5 12/8 15/1 15/6 21/7 22/24 24/25 25/23 26/1 26/3 27/16 32/7 34/4 35/5 35/12</p> <p>TYPEWRITING [1] 39/9</p> <p>typically [2] 5/5 12/19</p> <p>U</p> <p>unarmed [1] 23/2</p> <p>unauthorized [2] 5/23 10/21</p> <p>under [21] 5/13 5/22 7/5 7/17 8/2 8/21 9/9 9/20 25/16 25/20 26/7 26/10 26/22 26/23 28/8 28/18 29/8 35/11 36/18 36/19 39/9</p> <p>understand [1] 31/24</p> <p>undisputed [1] 11/21</p> <p>unharmful [1] 22/23</p> <p>unique [1] 22/8</p> <p>unless [1] 6/1</p> <p>unlike [3] 20/24 21/25 24/17</p> <p>until [2] 3/11 21/16</p> <p>up [10] 13/19 15/7 17/17 17/24 22/3 22/12 26/5 27/10 33/6 37/20</p> <p>upheld [1] 19/8</p> <p>upon [2] 11/25 33/13</p> <p>us [4] 20/18 24/16 28/13 30/9</p> <p>use [19] 5/23</p>	<p>12/18 14/16 14/21 15/7 17/25 18/11 21/2 21/16 21/17 21/21 25/23 25/24 26/16 27/6 27/20 29/7 29/16 36/22</p> <p>used [5] 5/5 8/13 21/17 21/24 28/17</p> <p>using [3] 11/4 28/12 28/13</p> <p>V</p> <p>Valdez [21] 4/17 4/25 10/19 10/21 13/17 14/9 14/10 14/15 16/2 16/3 21/6 22/2 22/6 22/10 23/17 27/6 27/9 27/21 27/24 33/22 34/25</p> <p>valid [1] 8/3</p> <p>Vargas [1] 9/2</p> <p>various [1] 27/5</p> <p>VEGAS [3] 2/11 2/20 3/1</p> <p>version [1] 24/7</p> <p>very [10] 4/19 6/15 12/2 24/3 24/23 26/18 31/16 35/13 36/1 38/3</p> <p>VIA [1] 2/2</p> <p>video [23] 4/24 5/3 10/3 10/4 10/17 11/16 12/14 12/23 13/11 13/17 16/13 20/6 20/9 21/22 22/4 23/9 23/18 24/14 27/16 28/2 31/10 31/17 34/7</p> <p>videos [4] 23/15 23/15 24/22 27/16</p> <p>view [1] 11/10</p> <p>violated [4] 6/5 7/3 9/21 17/3</p> <p>violating [2] 26/12 32/5</p> <p>violation [8] 5/13 8/8 12/14 12/16 17/10 17/15 32/21 36/18</p> <p>violations [12] 5/11 5/21 7/5 7/6 7/15 7/16 7/19 7/23 9/20 17/2 25/23 37/6</p> <p>violence [2] 5/17 9/25</p>	<p>W</p> <p>Wachter [4] 12/5 12/24 16/1 18/6</p> <p>waiting [1] 34/25</p> <p>walk [1] 15/7</p> <p>walked [1] 13/9</p> <p>wall [23] 4/23 5/1 10/13 10/19 13/3 13/19 14/12 14/15 14/23 17/8 28/4 31/12 31/15 32/3 32/8 32/10 32/11 32/25 33/7 33/7 34/4 34/23 35/1</p> <p>want [5] 3/9 3/23 25/6 30/12 30/21</p> <p>wanted [2] 4/2 37/16</p> <p>warden [13] 12/7 12/9 12/9 17/17 17/22 18/7 18/9 20/7 20/8 33/12 33/12 36/11 36/12</p> <p>wardens [2] 12/8 23/12</p> <p>warranting [1] 6/13</p> <p>was [137]</p> <p>WASHINGTON [1] 2/9</p> <p>wasn't [9] 5/4 5/4 12/20 13/2 13/15 15/14 16/21 35/4 35/5</p> <p>watch [2] 23/8 24/22</p> <p>watched [4] 15/4 24/5 24/14 24/20</p> <p>way [4] 17/17 22/5 32/14 32/23</p> <p>we [64]</p> <p>we'll [5] 4/8 19/19 19/24 38/8 38/10</p> <p>we're [7] 4/12 6/3 21/3 23/1 37/11 37/12 37/12</p> <p>we've [2] 37/24 38/3</p> <p>weapon [1] 20/25</p> <p>well [3] 10/7 14/13 34/10</p> <p>went [4] 3/10 29/3 29/6 35/5</p> <p>were [29] 5/3 5/11 5/13 7/6 13/3 14/9 14/18 15/9 16/4 16/7 16/8 16/12 16/14 16/19 17/18</p>	<p>17/18 17/23 17/25 20/1 20/4 21/7 21/17 27/24 28/6 30/20 32/12 33/21 38/19 39/8</p> <p>weren't [1] 31/3</p> <p>what [35] 3/9 4/19 8/6 12/13 13/22 13/25 14/17 14/19 16/20 19/23 19/23 20/9 20/9 21/8 21/21 23/1 23/20 23/23 24/16 25/1 26/2 27/9 28/1 29/2 29/10 29/11 32/7 33/18 34/6 34/9 35/6 36/24 37/12 37/18 38/1</p> <p>what's [6] 20/10 26/21 31/23 33/3 37/16 37/18</p> <p>Whatever [1] 30/3</p> <p>wheel [1] 29/14</p> <p>when [10] 8/13 11/16 14/25 15/7 20/7 21/2 22/2 27/24 31/10 33/22</p> <p>where [8] 7/20 11/12 12/3 20/12 22/3 29/22 34/25 35/1</p> <p>WHEREOF [1] 39/13</p> <p>whether [13] 7/14 8/6 9/14 9/15 9/16 18/21 25/21 28/15 28/16 28/19 28/19 35/14 36/15</p> <p>which [18] 4/13 4/20 5/17 6/22 7/11 9/3 9/4 10/8 11/6 11/25 22/16 22/22 23/11 24/23 25/1 26/3 27/9 31/5</p> <p>while [11] 10/3 10/21 12/25 14/15 16/12 31/3 31/18 33/3 35/21 36/23 37/10</p> <p>white [2] 30/25 31/19</p> <p>who [3] 23/22 23/22 28/12</p> <p>whole [2] 11/11 28/10</p> <p>why [2] 8/10 22/6</p> <p>wide [1] 12/10</p> <p>will [1] 37/21</p>
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<p>W</p> <p>Willett [3] 15/12 15/12 15/13</p> <p>willfully [1] 12/18</p> <p>WILLIAMS [2] 1/20 30/25</p> <p>winning [1] 29/8</p> <p>within [2] 10/10 34/22</p> <p>without [2] 18/23 32/5</p> <p>WITNESS [1] 39/13</p> <p>witnesses [2] 12/4 27/1</p> <p>woman [1] 20/13</p> <p>won't [1] 5/25</p> <p>word [3] 16/3 29/9 30/17</p> <p>work [2] 29/24 29/24</p> <p>would [11] 4/1 6/12 7/12 19/6 23/20 25/21 26/2 28/15 29/21 30/10 34/21</p> <p>wouldn't [1] 13/9</p> <p>write [1] 33/9</p> <p>wrong [2] 23/23 25/3</p> <p>wrote [3] 5/9 10/6 10/24</p>				
<p>X</p>				
<p>XVI [1] 1/3</p>				
<p>Y</p> <p>Yeah [1] 24/12</p> <p>year [2] 29/22 29/22</p> <p>Yes [4] 3/25 4/11 11/19 19/13</p> <p>yet [4] 6/21 7/17 12/21 31/21</p> <p>you [63]</p> <p>you'd [2] 26/12 26/13</p> <p>you're [6] 4/12 4/20 14/3 20/21 29/2 30/7</p> <p>your [17] 3/13 3/16 4/11 11/14 11/18 19/12 19/14 22/17 22/20 23/7 29/9 29/13 30/18 37/17 37/21 38/11 38/13</p>				

Steve Sisolak
Governor



Deonne E. Contine
Director

Michelle L. Morgando, Esq.
Senior Appeals Officer

Northern Nevada:
Hearing Office
1050 E William St, Ste 400
Carson City, Nevada 89701
(775) 687-8440 | Fax (775) 687-8441

Appeals Office
1050 E William St, Ste 450
Carson City, Nevada 89701
(775) 687-8420 | Fax (775) 687-8421

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
Hearings Division
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Southern Nevada:
Hearing Office
2200 S Rancho Drive, Ste. 210
Las Vegas, Nevada 89102
(702) 486-2525 | Fax (702) 486-2879

Appeals Office
2200 S Rancho Drive, Ste 220
Las Vegas, Nevada 89102
(702) 486-2527 | Fax (702) 486-2555

August 15, 2019

The Honorable Timothy C Williams
Eighth Judicial District Court
Department XVI
200 Lewis Avenue
Las Vegas, NV 89101

Re: State of Nevada ex rel its Department of Corrections
vs Jose Miguel Navarrete, et al, Case No A-19-797661-J

Dear Judge Williams.

The Record on Appeal was filed on August 14, 2019, in the above entitled matter. Enclosed are Exhibits J and L, which were filed under seal. The references to Exhibit J and L in the Record are at bated pages 00642-00643 and 00649-00650, respectively.

Also enclosed are 6 CD/DVDS referenced in the Record as follows.

DOC010 Petitioner's List of Exhibits

Petitioner's Exhibit 8	bated page reference 00709-00710
Petitioner's Exhibit 9	bated page reference 00711-00712
Petitioner's Exhibit 10	bated page reference 00713-00714

DOC011 NDOC's Pre-Hearing Statement

CD/DVD (2) part of Respondent's Exhibit A	bated page reference 00837-00838
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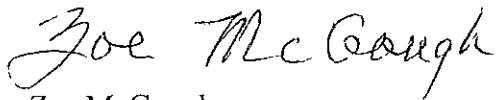
DOC 040 Petitioner's Exhibit 11

bated page reference 01150-01151

Case No. A-19-797661-J
August 15, 2019
Page 2

Should you have any questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Zoe McGough". The signature is written in black ink and is positioned above the printed name and title.

Zoe McGough
Legal Secretary II

Enclosures: 1) Exhibits J and L, Confidential Documents filed under seal
2) Six CD/DVDs

cc: Michelle Di Silvestro Alanis, Esq. w/o enclosures
Daniel Marks, Esq. w/o enclosures